Dura-Line Corporation, a subsidiary of Mexichem *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC, Local 14300-12. Cases 09–CA–163289, 09–CA–164263, 09–CA–165972, 09–CA–166481, and 09–CA–167265

July 12, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On June 20, 2017, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed a reply brief. The General Counsel filed limited exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.[2]

[1] We have amended the judge's conclusions of law and remedy and modified the judge's recommended Order consistent with our findings herein and to conform to the Board's standard remedial language.

[2] The Respondent implicitly excepts to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's findings that Middlesboro managers and supervisors threatened employees on numerous occasions in violation of Sec. 8(a)(1) of the Act, including by blaming the plant closure of the Middlesboro, Kentucky plant on their grievance filing, telling an employee he would need bodyguards to protect him from other employees for pursuing a grievance, and telling an employee not to discuss his wages or the Clinton, Tennessee facility with anyone. We also adopt, in the absence of exceptions, the judge's finding that the Respondent destroyed the personal property of employee Freddie Chumley in violation of Sec. 8(a)(4) and (1). Finally, we adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to provide the Union notice and an opportunity to bargain over its decision to close its facility in Middlesboro, lay off employees, and transfer equipment and work.

I. THE RESPONDENT'S DECISION TO CLOSE ITS PLANT IN MIDDLESBORO AND TRANSFER PRODUCTION

A. Relevant Facts

From 1971 until 2015, the Respondent operated a plant in Middlesboro, Kentucky, which produced standard conduit and two types of pipe, "MicroDuct" and "FuturePath," for use in the telecommunications industry. The Union had represented a unit of production and maintenance employees there since 1987. In September 2014, the Respondent was purchased by Mexichem, a publicly-traded, multinational chemical company.[3] At that time, the Respondent proposed that Mexichem close its Middlesboro plant and transfer production to an unspecified plant in the eastern United States.[4] In support of that suggestion, the Respondent submitted a detailed proposal that described its market position, identified significant limitations of the Middlesboro plant,[5] explained how a new facility could improve production, and provided supporting financial data and earnings projections. Among other improvements planned, the new facility would include five "high output" lines that would increase production as well as a dedicated research and development line.[6] The Respondent also stated that, although it could not run 24/7 at Middlesboro due to the current union contract, it would plan to do so at the new facility.

In February 2015, the roof of the Middlesboro facility collapsed, damaging equipment, slowing production, and causing customers to threaten to find new suppliers.[7] As a result, the Respondent transferred some of the standard

We agree with the judge that the parties' contract allowed the Respondent to unilaterally implement the relocation under the circumstances. Member McFerran notes, however, that this dismissal should not be read to suggest that a management rights clause permitting an employer to act unilaterally can insulate an employer from liability under the Act when the underlying action is unlawfully motivated under Sec. 8(a)(3). She observes that this issue is no longer presented in this case, however, because the Board is reversing the judge's finding that the relocation decision was unlawfully motivated.

The judge found that the Respondent's Confidentiality/Non-Disclosure Agreement was unlawfully overbroad. We shall sever this allegation and retain it for further consideration.

[3] No party contends that Mexichem and the Respondent are either a single employer or joint employers under the Act.

[4] The Respondent had discussed closing the Middlesboro facility with the previous owner as well.

[5] The proposal explained that geographic limitations prevented needed expansion of production lines; that its equipment was antiquated; that low production-line productivity resulted in higher costs; that the current power-distribution system was operating at maximum capacity; and that transportation to and from the facility was problematic given the absence of a rail spur into the plant and the fact that the nearest interstate highway was approximately 60 miles away.

[6] As the judge found, research and development at Middlesboro was cumbersome and required the Respondent to shut down production.

[7] Dates are in 2015 unless noted otherwise.

conduit production from Middlesboro to its plant in Elyria, Ohio.

In March, the Respondent identified a site for a new facility in Clinton, Tennessee, about 25 miles from its headquarters, where it planned to manufacture the remaining products made at Middlesboro—MicroDuct and FuturePath—as well as to establish a full research and development line.

In June, the Respondent submitted a proposal requesting $16.8 million from Mexichem for the relocation to Clinton, in which it projected that the relocation would result in a 23 percent return on investment. The proposal stated that the roof collapse, the expanding market for MicroDuct, and the prospect of bargaining for a successor to the Middlesboro collective-bargaining agreement—which was due to expire at about the time operations there would be winding down—required that the Respondent and Mexichem "accelerate moving forward with this initiative."[8] The purchase was finalized that month.

In August, the Respondent notified Middlesboro managers of the impending closure. On September 15, the Respondent announced to employees that it was closing the plant and relocating production. On September 21, the Respondent formally notified the Union of the closure and invited bargaining over the effects of that decision.[9] Effects bargaining took place on October 12, November 9, and December 16.

The Middlesboro facility closed in late December. Production transferred as proposed to the Clinton, Elyria, and Tennille locations. The Respondent invested more than $20 million in the relocation and projected a total average increase in earnings of $9.6 million per year over 10 years. Three 90- to 100-foot production lines from Middlesboro were transferred to Clinton; each of those production lines is now approximately 220 feet long. The new lines run faster and are more productive than those in Middlesboro; the new equipment at Clinton would not have fit inside the Middlesboro facility; and the Clinton plant is approximately 5 miles from an interstate highway. The production lines relocated to Elyria and Tennille were also improved and lengthened. Each facility is larger than the Middlesboro plant, and, whereas the Respondent could only manufacture 600 pounds of product per hour at Middlesboro due to the short length of the building, the Elyria facility alone can produce 1200 pounds per hour.

[8] The collective-bargaining agreement was effective April 18, 2013, to April 18, 2016.

[9] In October, the Respondent submitted its final proposal to Mexichem for an investment of $3.5 million to permanently relocate standard conduit production to its existing facilities in Elyria, Ohio (which had been producing it since the roof collapse) and Tennille, Georgia.

B. Analysis

The judge, applying *Wright Line*,[10] found that the Respondent violated Section 8(a)(3) and (1) by closing the Middlesboro facility and relocating production. We disagree and find that the Respondent has met its *Wright Line* rebuttal burden.

The Respondent has established that it would have closed the outdated Middlesboro plant and relocated production for compelling economic reasons regardless of the Union's presence there and the relatively low-level union activities that Middlesboro managers complained about.[11] The Respondent's need for a modernized facility that could accommodate its production requirements and permit significant expansion, utilize new technology, establish a dedicated research and development line, and improve transportation options cannot reasonably be disputed. Such changes were critical to increasing the productivity and efficiency of the Respondent's operations, and the record establishes that these improvements

[10] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[11] We agree with the judge that the General Counsel met his initial burden under *Wright Line*. As for the requisite animus, there are no exceptions to the judge's findings that Middlesboro managers made numerous statements and unlawful threats blaming the plant closure on employees' union activities, primarily the union president's grievance-filings.

Contrary to the judge, however, we find no other evidence of unlawful motive. The fact that the Respondent informed Mexichem that the Middlesboro plant was unionized and that the current contract restricted 24/7 production is not evidence of animus. Nor is the Respondent's pragmatic request that Mexichem accelerate its decision because bargaining for a new union contract at Middlesboro would commence about the time that operations there would be winding down. Similarly, the Respondent's desire to delay a job posting and press release is not evidence of animus. The Respondent did not want the Union and its customers finding out about the closure before it was prepared to go public, reflecting a legitimate desire to minimize disruption. Notably, the Respondent, despite initial secrecy, ultimately timely notified employees and the Union about its plans and engaged in effects bargaining. To the extent the Respondent's secrecy might suggest a desire to avoid having unionized Middlesboro employees seek positions at the new facility, we find (as we now discuss) that the Respondent's rebuttal evidence establishes that the relocation decision itself was based on corporate-level operational and financial considerations. We also do not find that the Respondent provided "shifting" reasons for the relocation or that it imposed "hurdles" on employees merely by telling them, prior to commencing effects bargaining, that if they wanted to work at Clinton they could apply there, particularly given the absence of evidence that having to travel to Clinton (which was not prohibitively distant from Middlesboro) to apply would have tended to dissuade any Middlesboro employees from doing so. Finally, we find that the Clinton plant manager's suggestion that the Respondent hire a labor consultant—which the Respondent did not act on—is irrelevant to the Respondent's decision to close its Middlesboro plant.

could not be accomplished at its Middlesboro location. It is also undisputed that, as a result of the relocation, production of standard conduit doubled and gross earnings are projected to increase at a rate of $9.6 million per annum. Finally, it is implausible that the Respondent would have proposed that its new parent company embark on a $20 million relocation and expansion initiative in order to relieve itself of allegedly excessive union grievance filings over local matters or to otherwise undermine the Union.[12]

Accordingly, we dismiss this allegation.

II. THE RESPONDENT'S PROMULGATION OF ITS CONFIDENTIALITY/NON-DISCLOSURE AGREEMENT

In September, the Middlesboro HR manager presented a Confidentiality/Non-Disclosure Agreement (Agreement) to an employee and offered him a position at the Clinton facility. The Agreement prohibits employees from sharing with third parties "confidential information," which is defined to include the Respondent's relocation plans and other business and financial plans. The HR manager advised the employee not to talk to anyone about the closure, his job in Clinton, or his wages.[13]

The judge found that the Agreement was unlawful for two reasons. First, the judge found that the Agreement was unlawfully promulgated in response to union activity. The judge made that finding without any supporting analysis, tersely stating, in relevant part: "I find that the confidentiality agreement violates the Act . . . because the rule was promulgated in response to union activity," and dropping a footnote remarking that she had "already found that the closure of the Middlesboro facility and the transfer of its work was motivated by the union activity of Respondent's employees."[14] On exception, the Respondent, with similar brevity, argues that "[t]he Confidentiality Agreement was not promulgated in response to union activity" but rather "to help control the flow of information" about the closure of the Middlesboro facility, as testified to by Chuck Parke, the Respondent's senior vice president of operations. In his answering brief, the General Counsel merely states, without elaboration or citation to any record evidence, that the Agreement was "promulgated in part to prevent foreseeable union activity regarding [the Respondent's] relocation." In this litigation posture, we are unable to adopt the judge's finding that the Respondent unlawfully promulgated the Agreement. The record supports the Respondent's assertion that it had legitimate concerns about controlling the timing of the disclosure of news that it was engaging in a major reallocation of resources involving the closure of one facility and the opening of another with State financial support. Moreover, the Respondent required at least some of its managers to sign confidentiality agreements as well. We do not find that the General Counsel has sustained his burden to prove that the Respondent promulgated the Agreement in part to prevent union activity.[15] Accordingly, we reverse the judge and dismiss the unlawful promulgation allegation.[16]

[12] See *Gunderson Rail Services, LLC*, 364 NLRB No. 30, slip op. at 43 (2016) (finding facility closure lawful where employer was motivated by "more global concerns" than a union drive, such as "to increase profits and meet Wall Street demands" after a hostile takeover attempt); *Chemical Solvents, Inc.*, 362 NLRB No. 164, slip op. at 6–7 (2015) (rejecting allegation that "a smattering of comparatively low-level union activities [e.g., grievance-filing and the mention of a possible strike] would have played a significant role in the Respondent's decision to shut down an entire division" at an annual savings of $300,000); see also *Nu-Skin International*, 320 NLRB 385, 385, 404–405 (1995); *Litton Mellonics Systems Division*, 258 NLRB 623, 625–626 (1981), enfd. mem. 738 F.2d 447 (9th Cir. 1984).

We further note that, in reaching a contrary result, the judge relied on inapposite cases in which respondents failed to provide evidence supporting relocation and layoff decisions. See *Vico Products Co.*, 336 NLRB 583, 588–591 (2001) (respondent's stealth was evidence of unlawful motive where it leased new space in another state and suddenly and secretly relocated equipment without informing the union), enfd. 333 F.3d 198 (D.C. Cir. 2003); *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991) (finding mass layoff unlawfully motivated where, inter alia, respondent's principal supporting documentation was a 1-page sales summary). The judge cited other inapposite cases where, among other things, respondents admittedly relocated to avoid union or protected activity. See *Amglo Kemlite Laboratories, Inc.*, 360 NLRB 319, 325–326 (2014), enfd. 833 F.3d 824 (7th Cir. 2016); *Allied Mills, Inc.,* 218 NLRB 281, 282–283 (1975), enfd. mem. 543 F.2d 417 (D.C. Cir. 1976), cert. denied 431 U.S. 937 (1977); *Royal Norton Mfg. Co.*, 189 NLRB 489, 490–492 (1971).

[13] As previously noted, there are no exceptions to the judge's finding that the HR manager's statement violated Sec. 8(a)(1) of the Act.

[14] As explained above, we have reversed the judge and dismissed the allegation that the plant closure violated Sec. 8(a)(3) and (1) because the Respondent proved that it would have closed the Middlesboro plant even absent any union activities.

[15] Several email messages in the record indicate that the Respondent preferred to delay a public announcement that it would be opening a facility in Clinton, Tennessee to avoid complicating the parties' effects bargaining over the closure. However, the General Counsel does not rely on this evidence but instead has chosen to rest on the conclusory assertion, quoted above, that the Agreement was "promulgated in part to prevent foreseeable union activity regarding [the Respondent's] relocation." Since the General Counsel does not rely on these email messages, neither do we.

[16] Member Kaplan notes that whether the Respondent's plant closure violated Sec. 8(a)(3) and (1) is not dispositive of whether its promulgation of the Agreement was also unlawful. As we have found here, however, there is insufficient evidence to conclude that the Agreement was unlawfully promulgated.

Member McFerran would affirm the finding that the Confidentiality Agreement was unlawfully promulgated in response to union activity. She believes that, notwithstanding the eventual timely offer to engage in effects bargaining, the evidence shows that the Respondent initially wished to avoid dealing with the Union regarding issues related to the relocation and to avoid the potential for employees at the unionized Middlesboro facility applying at the new location.

The judge also found that the Agreement was unlawfully overbroad because employees would reasonably construe it as prohibiting Section 7 activity. We sever the allegation that the Agreement was overbroad and retain it for further consideration.

III. THE RESPONDENT'S UNILATERAL REDUCTION OF THE AMOUNT OF ITS 2015 THANKSGIVING BONUS

The parties' collective-bargaining agreement required the Respondent to provide employees $16 gift cards for Thanksgiving holidays. For the past several years, however, the Respondent provided employees with $25 cards instead. In 2015, the Respondent reverted to providing employees with $16 cards, without affording the Union notice and an opportunity to bargain.

The complaint alleged that the Respondent unilaterally reduced the card amount from $25 to $16 in violation of Section 8(a)(5) and (1) of the Act. The judge agreed, finding that the Respondent had established a past practice of providing $25 cards and was obligated to bargain over the change to the $16 cards.

We disagree. We find that the extra $9 value of the $25 gift cards constituted gifts not subject to mandatory bargaining. The Board has long held that token items given to all employees on an equal basis without regard for individual work performance, earnings, seniority, production, or other such factors, as here, are gifts and are not mandatory bargaining subjects.[17] Accordingly, we reverse the judge and find that the Respondent's unilateral $9 reduction in the value of the Thanksgiving gift cards was not unlawful, and dismiss the allegation.

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 10, 11, and 13, and renumber the remaining paragraphs.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully destroyed the personal property of employee Freddie Chumley, we shall order the Respondent to reimburse Chumley for any loss of property attributable to its unlawful conduct with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall also order the Respondent to compensate Chumley for the adverse tax consequences, if any, of receiving a lump-sum make-whole remedy, and to file with the Regional Director for Region 9, within 21 days of the date the amount of the make-whole remedy is fixed, either by agreement or Board order, a report allocating the make-whole remedy to the appropriate calendar year for Chumley. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Because the Respondent's Middlesboro facility is closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.[18]

ORDER

The Respondent, Dura-Line Corporation, a subsidiary of Mexichem, Middlesboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure because they sought to enforce the collective-bargaining agreement and engaged in other activities on behalf of the Union.

(b) Threatening employees that they would need bodyguards if they continued their grievance-filing activity.

(c) Threatening employees by stating that the Respondent wanted to get rid of the Union because the Respondent wanted to do whatever it wanted to do.

(d) Threatening employees by stating that the Respondent was closing the Middlesboro plant because the Union had secured the reinstatement of two discharged employees.

(e) Threatening employees by telling them that they could thank the local union president, the Union, and the Union's grievances for the closing of the Middlesboro plant.

(f) Threatening employees by telling them that they cannot speak with other employees regarding their terms and conditions of employment or anything related to its Clinton, Tennessee facility.

(g) Destroying the personal property of employees because they provided testimony to the Board and cooperated in a Board investigation.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[17] See *Stone Container Corp.*, 313 NLRB 336, 337 (1993) (citing *Benchmark Industries*, 270 NLRB 22 (1984), enfd. mem. sub nom. *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985)).

[18] The General Counsel seeks a make-whole remedy that includes consequential damages incurred as a result of the Respondent's unfair labor practices. The relief sought would involve a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. See, e.g., *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017). We otherwise find that the Board's standard remedies are sufficient to effectuate the policies of the Act, and accordingly we decline to order a notice-reading remedy.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employee Freddie Chumley whole for the loss of his personal property suffered as a result of the discrimination against him, plus interest, in the manner set forth in the amended remedy section of this decision.

(b) Compensate Freddie Chumley for any adverse tax consequences of receiving a lump-sum make-whole remedy, and file with the Regional Director for Region 9, within 21 days of the date the amount of the make-whole remedy is fixed, either by agreement or Board order, a report allocating the make-whole remedy to the appropriate calendar years for Chumley.

(c) Within 14 days after service by the Region, mail, at its own expense, a copy of the attached notice marked "Appendix"[19] to the Union and to all employees employed by the Respondent at its Middlesboro, Kentucky facility at any time since June 26, 2015, in the manner set forth in the remedy section of this decision. Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall also be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation that the Respondent violated Section 8(a)(1) by maintaining the Confidentiality/Non-Disclosure Agreement is severed from this case and retained for future resolution.

Dated, Washington, D.C. July 12, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with plant closure if you seek to enforce the collective-bargaining agreement or engage in activities on behalf of the Union.

WE WILL NOT threaten you that you will need bodyguards if you continue your grievance-filing activity.

WE WILL NOT threaten you by telling you that we want to get rid of the Union because we want to do whatever we want to do.

WE WILL NOT threaten you by stating that we are closing the Middlesboro plant because the Union secured the reinstatement of discharged employees.

WE WILL NOT threaten you by stating that you can thank the local union president, the Union, and the Union's grievances for the closing of the Middlesboro plant.

WE WILL NOT threaten you by telling you that you cannot speak with other employees regarding your terms and conditions of employment or anything related to our Clinton, Tennessee facility.

WE WILL NOT throw away your personal belongings because you cooperated in a National Labor Relations Board investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Freddie Chumley whole for the loss of his personal property resulting from the discrimination against him, plus interest.

WE WILL compensate Freddie Chumley for the adverse tax consequences, if any, of receiving a lump-sum make-whole remedy, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of the make-whole remedy is fixed, either by agreement or Board order, a report allocating the make-whole remedy to the appropriate calendar years for Freddie Chumley.

DURA-LINE CORPORATION, A SUBSIDIARY OF MEXICHEM

The Board's decision can be found at www.nlrb.gov/case/09-CA-163289 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Linda Finch, Esq. for the General Counsel.
Howard Jackson, Esq. for the Respondent.
Matthew Lynch, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Middlesboro, Kentucky, from June 27 through July 1, 2016. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC (International Union) filed the charge in Case 09–CA–163289 on November 4, 2015, in Case 09–CA–164263 on November 17, 2015, and in Case 09–CA–165972 on December 4, 2015. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC, Local 14300-12 (Local Union or Union) filed the charge in Case 09–CA–165972 on December 22, 2015, and in Case 09–CA–167265 on January 8, 2016. The General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing on February 29, 2016. (GC Exh. 1(k).) On April 14, 2016, the General Counsel issued an order consolidating cases, second consolidated complaint, and notice of hearing. (GC Exh. 1(s).) On April 15, 2016, the General Counsel filed an amendment to the second consolidated complaint. (GC Exh. 1(u).) On April 25, 2016, the General Counsel issued a second amendment to second consolidated complaint and on April 26 issued an erratum. (GC Exhs. 1(w) and (y).) Ultimately, on May 5, 2016, the General Counsel issued an amended second consolidated complaint (complaint). (GC Exh. 1(dd).)

The complaint alleges that Dura-Line Corporation, a subsidiary of Mexichem (Respondent), violated Sections 8(a)(1), 8(a)(3), 8(a)(4), and 8(a)(5) of the Act by: making numerous threats to employees; requiring employees to sign non-disclosure agreements; closing its Middleboro, Kentucky, facility, transferring the work of the Middlesboro facility to other facilities, and laying off bargaining unit employees; destroying the property of an employee; refusing to bargain over its decisions to lay off unit employees, relocate equipment and work, and close its facility; and reducing an employee Thanksgiving benefit.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses, [1] and after considering the briefs filed by the General Counsel, Charging Parties, and Respondent,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, was engaged in the manufacture and sale of polyethylene conduit, pipe, and related products at its facility in Middlesboro, Kentucky, where it sold and shipped goods valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union and International Union are labor organizations within the meaning of Section 2(5) of the Act. (GC Exh. 1(ii).)

[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, and evidence presented at trial, as well as logical inferences drawn therefrom.

[2] On September 15, 2016, Respondent filed a reply brief and on September 2, 2016, the General Counsel filed a Motion to Strike Respondent's reply brief. On September 23, 2016, I issued an Order to Show Cause and on September 26 Respondent filed a Motion for Permission to File Reply Brief, Opposition to Motion to Strike, and Response to Order to Show Cause. Section 102.42 of the Board's Rules and Regulations, Series 8, as amended, makes no provision for the filing of reply briefs to administrative law judges, and allowing such is a matter addressed to the administrative law judge's discretion. *Coca-Cola Bottling Works*, 186 NLRB 1050, 1050 fn. 2 (1970). The administration of justice requires an end to litigation at some point. *Franks Flowers Express*, 219 NLRB 149, 150 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976). The original date for the filing of briefs was August 5, 2016, but Chief Judge Giannasi granted Respondent an extension of time, to August 30, 2016, and granted the Charging Party an extension of time to September 9, 2016. Later, Deputy Chief Judge Amchan granted Respondent and the General Counsel an extension of time to file briefs to September 12, 2016. Respondent's counsel has not demonstrated why he could not have fully argued the facts and applicable law in his initial brief, filed over 2 months after the hearing in this matter closed. Accordingly, the General Counsel's motion is granted and Respondent's reply brief is stricken.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Management and Corporate Structure

Dura-Line's corporate headquarters is located in Knoxville, Tennessee. Dura-Line operated a manufacturing facility in Middlesboro, Kentucky (Middlesboro facility), from 1971 until 2015. (R. Exh. 2.) Middlesboro was Dura-Line's first plant and was its only unionized facility in the United States. (R. Exh. 11.)

Respondent Dura-Line has been owned by Mexichem since September 2014. (Tr. 301.) Mexichem is a chemical company with plants around the world; some of its plants outside of the United States are unionized. (Tr. 322.) Mexichem did not have a presence in the United States until it acquired Dura-Line. Mexichem operates three groups of businesses, which manufacture: (1) chlorinated products; (2) fluorine products; and (3) pipes. All of the pipe manufacturing facilities report to Paresh Chari, Dura-Line's Chief Executive Officer (CEO). Chari has been Dura-Line's CEO for about 10 years.

At all relevant times, Wes Tomaszek served as Respondent's Chief Financial Officer (CFO) and Michael Hilliard served as Respondent's senior vice president of global operations. For about 1 year, starting in January 2015, Chuck Parke served as Respondent's Senior Vice President of Operations. Respondent admits, and I find, that Parke is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(ii).)

At the time of the events giving rise to this case, Patsy Wilhoit was Respondent's human resources manager and Mike Roark was Respondent's interim plant manager/production manager in Middlesboro. In addition, Bruce Wasson served as maintenance manager, Chris Ramsey served as fabrication supervisor, David Jackson served as 3rd shift supervisor, Jeffrey Hatfield served as 1st shift supervisor, William Calhoun served as quality manager, and Clifton West served as scheduler and fill-in supervisor in Middlesboro. Respondent admits, and I find, that Wilhoit, Roark, Wasson, Ramsey, Jackson, and J. Hatfield are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. Respondent denies the supervisory or agency status of Calhoun and West. (GC Exh. 1(dd) and (ii).)

B. Respondent's Labor Relations

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC, Local 14300-12 (Local Union or Union), has represented the following unit of Dura-Line employees since 1987:

> All production and maintenance employees employed by [Respondent] at its Middlesboro, Kentucky facility, including plant clerical employees and assistant shift leaders, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(GC Exh. 1(dd) and (ii); R. Exh. 1.)

Respondent's most recent collective-bargaining agreement with the Union was effective April 18, 2013, though April 18, 2016. This agreement contained the following provision:

> ARTICLE IV. Management's Rights Clause.
>
> Except to the extent expressly abridged by a specific provision of this Agreement, the Employer reserves and retains solely and exclusively all of its inherent rights to manage the business.
>
> Without limiting the generality of the foregoing, the sole and exclusive rights of management which are not abridged by this [a]greement include, but are in no way confined to, the right to establish reasonable rules and regulations governing the conduct of employees; the right to terminate employees in accordance with the terms of this [a]greement; the right to determine and from time to time redetermine the number, location and types of its plants and operations; the right to close, lease, or sell such plants or operations; and the right to determine the methods, processes, and materials to be employed; the right to discontinue processes or operations, or to temporarily or permanently limit or curtail any part of or all of such processes or operations; to subcontract work; to determine the number of hours per day or per week operations should be carried on; and to determine the numbers of shifts and hours of shifts and the right to select and determine the number and types of employees required and assign work to such employees.

(R. Exh. 1.)

Robert Hatfield served as the local union president at the Middleboro facility from 2011 until the facility closed. (Tr. 145.) R. Hatfield was an active union president and filed many more grievances than his predecessors.

C. Respondent's Operations in Middlesboro

Respondent manufactured conduit at its Middlesboro facility by converting resin into pipes. (Tr. 291.) This process involved melting resin pellets, forming them with a die, and allowing the product to cool. (Tr. 144, 293.) Resin was transported to Middlesboro by truck from an offsite railhead. (Tr. 490–491.) The Middlesboro facility did not operate around the clock pursuant to an agreement between Respondent and the Union. (Tr. 297.)

About 15 to 20 percent of the product manufactured at Middlesboro was MicroDuct or FuturePath. (Tr. 482.) MicroDuct is a small pipe, about the size of a straw. (Tr. 286.) FuturePath is a bundle of MicroDuct. (Id.) Both products are used in the telecommunications industry. The remainder of the product manufactured in Middlesboro was standard conduit. Respondent employed approximately 125 employees at the Middlesboro facility. (Tr. 482.) About one-third of Respondent's Middlesboro employees worked on the MicroDuct and FuturePath lines. (Tr. 482.)

D. Respondent's Decision to Close the Middlesboro Facility

Dura-Line's corporate management began discussing the possibility of closing the Middlesboro facility with Dura-Line's previous owners and this was disclosed to Mexichem in September 2014. (R. Exh. 3; Tr. 283–285.) This plan would have closed the Middlesboro facility and leased a new plant some-

where in the eastern United States. (R. Exh. 3.) The new plant would have had the same product offerings as Middlesboro. (Id.) Requirements for the new plant would be a minimum length of 400 feet, a minimum width of 300 feet with room for expansion, total area of 120,000 square feet, a railroad spur on site, a location near a major highway, and a site size of 15 acres. (Id.) The capital expenditure request called for 5 high output standard conduit lines, 2 new MicroDuct lines, and 3 new FuturePath lines at the new facility. (R. Exh. 3; Tr. 298–299.) The capital expenditure request for this project sought a $13 million investment. (R. Exh. 3.)

Several reasons were asserted by Chari for wanting to close the Middlesboro facility. First, the Middlesboro facility was not efficient. (R. Exh. 3; Tr. 285–286.) Second, the Middlesboro facility was landlocked (i.e., lacked the capacity for expansion). (R. Exh. 3; Tr. 286.) Third, the Middlesboro facility was not flexible. (R. Exh. 3; Tr. 286.) Fourth, there was no room in the Middleboro facility to conduct research and development activities.[3] (R. Exh. 3; Tr. 287.)

In a presentation by Chari to Mexichem regarding closing the Middlesboro facility, three references were made to the fact that the Middlesboro work force was unionized. (R. Exh. 3; Tr. 284.) These references were:

- Unionized work force since 1987. (Background slide)
- Can't run all lines 24x7 (Union contract limitation). (Current Limitations slide)
- No contractual limitations to run 24x7 all lines. (New East US Plant-Proposal slide)

Chari further referenced numerous problems with the Middlesboro facility in his presentation, including: low productivity; space constraints; repairs needed to the power distribution system; high conversion costs; antiquated resin handling system; insufficient water process system; inefficient finished product flow; low roof line; prone to flash flooding; building is landlocked and cannot be expanded; no rail spur into facility; no interstate highway near plant; vintage equipment; no automation; and multiple maintenance issues. (R. Exh. 3.)

In January 2015, shortly after he began working for Respondent, Chuck Parke, Respondent's senior vice president of Operations, sent an email to his mentor. (R. Exh. 11.) In this email, Parke stated of the Middlesboro facility, "It is the only union facility and I have been asked to shut it down this year." He expressed surprise at Respondent's decision to close the Middlesboro facility because it produced the most volume and generated the most profit among Respondent's facilities. Parke explained that, at the time he sent his email, he was not aware of Chari's plan to open a facility closer to Respondent's corporate headquarters in Knoxville or that Middlesboro was an older facility and had limitations in terms of building structure and size and geographic location.[4] (Tr. 474.)

[3] Research and development was conducted at the Middlesboro facility, however this cumbersome process involved stopping production, performing testing, restarting the line, and then going to a lab for analysis and adjustments. (Tr. 325.)

[4] It should be noted that the new facility was not located until March 2015, and Chari did not request funding for the project until June 2015; both events occurring after Parke sent his email. (R. Exh. 4; Tr. 383.)

E. Acceleration of Middlesboro Closure and Decision to Open a New Facility in Clinton, Tennessee (Second and Third Capital Expenditure Requests)

In February 2015[5] the roof at the Middleboro facility collapsed due to snow and ice buildup. (Tr. 236.) Some equipment inside the building was damaged and sent out to be rebuilt. (Tr. 236, 247.) The roof collapse caused a great deal of turmoil and customers threatened to find new suppliers. (Tr. 306–307.) In order to retain its customers, Respondent began performing some of Middlesboro's manufacturing in different locations, including an existing plant in Elyria, Ohio.[6] (Tr. 303, 306–307.)

Respondent also began looking for another facility, closer to its Knoxville headquarters. (Tr. 383.) A site for the new facility was located in Clinton, Tennessee (Clinton facility) in March and the purchase was finalized in June. (Tr. 383.) The Clinton facility is about 25 miles from Respondent's corporate headquarters in Knoxville.

On May 28, Parke exchanged an email with Joel Baker, Respondent's director of manufacturing. (GC Exh. 14; Tr. 485–486.) Baker initiated the email, asking Parke if he was sure he wanted to post a job vacancy for a production manager in Clinton, "given the concerns about folks in the Union at KY finding out?" (GC Exh. 14.) Parke advised Baker not to post the position.

Lisa Jenkins was hired as Respondent's project engineer/project manager for the Clinton facility and later became plant manager. (Tr. 518–519.) On May 29, Jenkins exchanged emails with Dan Grosso, an employee in the finance department at Respondent's corporate headquarters. (GC Exh. 16; Tr. 524.) Jenkins advised Grosso that, "The [Middlesboro] KY facility's equipment is outdated and in need of a replacement and the facility has the only union represented work force of the 10 Duraline (sic) manufacturing locations." (GC Exh. 16.)

In June, Chari requested capital from Mexichem for opening the proposed state-of-the-art manufacturing and research and development facility in Clinton. (R. Exh. 4; Tr. 305.) Under this second plan, Middlesboro's MicroDuct and FuturePath lines would be relocated to the new Clinton facility, at a cost $16.8 million.[7] (Tr. 237, 313.) The new request showed a return on investment of 23 percent and increased EBIDTA[8] of $7.3 million per year. (R. Exh. 4, p. A-1-6; Tr. 507.) The capital expenditure request explained:

> Currently, MicroDuct volume accounts for less than 2% of Dura-Line's US business, but almost 25% of total gross margin dollars. The MicroDuct business is expected to continue growing at an annual rate of 10-15%, and by 2018 it will gen-

[5] All dates hereafter are in 2015, unless otherwise noted.

[6] The roof was eventually repaired. (Tr. 247, 380.)

[7] The email attached to the front of this capital expenditure request indicated that the increased costs are primarily attendant to the decision to buy, rather than lease, the new facility. (R. Exh. 4.)

[8] EBIDTA is an acronym for Earnings Before Interest, Taxes, Depreciation, and Amortization. (Tr. 366.) EBIDTA is the increase in earnings over the base case, which here would be the continued operation of the Middlesboro facility; however, in this capital expenditure request, it only compared MicroDuct and FuturePath production. (Id.)

> erate sales of $36 million and gross margin of approximately $20 million. Dura-Line is the only domestic manufacturer of MicroDuct products, and our current capacity to produce MicroDuct is fully utilized. In order to realize projected growth we seek approval for this project to acquire the facility in Clinton, Tennessee.

(R. Exh. 4.) The requested capital would be used to purchase 3 new MicroDuct lines, 2 FuturePath lines, and 1 new research and development line. (Id.) The capital would also be used to upgrade the MicroDuct and FuturePath lines that would be moved from Middlesboro to Clinton. (Id.) Development of the Clinton site would include 72,000 square feet of production, office, and warehouse space and 14,000 square feet of research and development space. (Id.) The building of a rail spur on the site would be subsidized by the State of Tennessee. (Id.)

This second capital expenditure request included a projection of labor costs for 10 years, but did not directly compare labor costs between Middlesboro and Clinton. (Id. at Schedule A-1-9) In an email to Chari discussing the specific project economics, Tomaszek stated:

> The roof collapse at our Middlesboro, Kentucky facility in February 2015, the prospect of union negotiations at that facility in early 2016 (Middlesboro is our only unionized plant and the existing collective bargaining agreement is up for renewal in March 2016), combined with the continued expansion of MicroDuct use in the U.S. marketplace requires us to accelerate moving forward with this initiative.

(R. Exh. 4.)

In his cover email to Mexichem accompanying the second capital expenditure request, Chari listed 3 reasons for hastening the closure of the Middlesboro facility: (1) the roof collapse; (2) increasing demand for MicroDuct and the need to meet customer requirements in an uninterrupted manner; and (3) impending union negotiations in Middlesboro. (R. Exh. 4.) Regarding the second reason, Chari conceded that a strike by the Union would have been such an interruption, but maintained this was "not part of the thought process." (R. Exh. 4; Tr. 347–348.) As to the third reason, Chari testified that the decision to move had already been made and he did not want to tie people up getting ready for collective bargaining.[9] (Tr. 308.)

In October, a third capital expenditure request was submitted by Chari to further "accelerate [the] shutdown of the Middlesboro, Kentucky facility." (R. Exh. 6.) The October capital expenditure request no longer sought to build a new plant in the eastern United States and instead sought to move the production of standard conduit from Middlesboro to Tennille, Georgia (GA-South or Georgia South)[10] and Elyria, Ohio. (R. Exh. 6.) The Georgia South plant had been closed for 2–3 years at the time of this decision. (Tr. 349.) Some of Middlesboro's production had already been moved to Elyria after the roof collapse. This third capital expenditure request sought $3.5 million for the project. Id. Return on investment was projected at 33 percent, EBIDTA would increase by $2.3 million per year over 10 years, and the payback period was 4.8 years. (R. Exh. 6.) This plan represented an expansion of Respondent's already existing business. (Tr. 497.)

Other factors also drove Chari to the decision to relocate Middlesboro's standard conduit work to Ohio and Georgia. (R. Exhs. 6; Tr. 303–307.) The Ohio facility had become a viable manufacturing location because some of Middlesboro's work had been transferred there after the roof collapse. The Ohio facility was larger and more efficient than Middlesboro. (Tr. 314.) Respondent also desired to be closer to its major customers in Ohio, Georgia, and Florida. (Tr. 313–314.) Respondent had been unable to locate a new facility in the northeastern U.S. Furthermore, a new plant was no longer needed to produce standard conduit in the Northeast because the pressure pipe market had collapsed due to a drop in oil prices. (Tr. 304; 509.)

In a cover email to Chari accompanying the October capital expenditure request, Tomaszek stated that the roof collapse in Middlesboro, accelerated market demand, moving into a busier part of the year, and the identification of the Clinton location as reasons for accelerating the closure of Middlesboro. (R. Exh. 6; Tr. 505.) Another factor listed by Tomaszek for accelerating the closure was, "the prospect of union contract negotiations at that facility in early 2016 (Middlesboro is our only unionized site and the collective-bargaining agreement is up for renewal in March 2016)." (R. Exh. 6.)

R. Exh. 6 contains an analysis of labor costs attendant to the transfer of work from Middlesboro to the facilities in Georgia and Ohio. R. Exh. 6 indicates that annualized labor costs in 2015 for the Middlesboro facility were $5.3 million. Wages and benefits for the Georgia South facility (no year listed) are listed as $1.84 million and for the Ohio facility at $2.85 million. Ohio future wages and benefits are listed at $3.95 million.[11]

Respondent's witnesses repeatedly testified that the presence of the Union in Middlesboro and the filing of grievances by Local Union President R. Hatfield had nothing to do with the decision to close the Middlesboro facility and relocate its work elsewhere. (Tr. 204–205, 312, 375, 402, 435, 503.) Kovacs testified that the subject of union grievances never came up in meetings regarding relocating the work of the Middlesboro facility. (Tr. 375.) None of Respondent's witnesses discussed what was specifically discussed at these meetings.

F. Closure of the Middlesboro Facility

On July 28, Respondent's former plant manager in Middles-

[9] Unlike Respondent's other witnesses, Parke testified that the possibility of a work slowdown or strike by the Union was considered by Respondent. (Tr. 484.) I have credited the testimony of Parke, as I found him to be more credible than Respondent's other witnesses.

[10] Respondent had 2 facilities in Georgia. The other site is located in Sandersville, GA and is referred to as GA-North. The capital expenditure request states that, "by dedicating 5 lines in GA-South to specialty products, GA-North will increase productivity by 4 lines." (R. Exh. 4, p. 4.) There is no evidence in the record that any of the work from the Middlesboro facility was transferred to GA-North.

[11] Chari testified that there was no analysis of labor costs when making the decision to close the Middlesboro facility. (Tr. 360.) Kovacs was not asked about whether labor costs were analyzed. Tomaszek, however, testified that a labor cost comparison was performed as set forth in R. Exh. 6. (Tr. 516.)

boro, Paul Velasquez, sent an email announcing his resignation to Roark. (GC Exh. 12.) Roark replied, via email, ". . . I do understand Paul. And don't blame you. We all know what's going to happen in KY." (Id.) Roark testified that his reply was referring to a previous occasion when Respondent's plant manager resigned and he [Roark] was asked to serve as interim plant manager for 2 years. (Tr. 467–468.) He found serving in these dual roles overwhelming.

Parke and Hilliard advised the managers in Middlesboro of the impending closure of the facility on August 3. (Tr. 187, 229, 443, 469.) Respondent provided these managers with confidentiality agreements to sign. (Tr. 187–188, 443, 469.) They were also advised not to discuss the impending closure with anyone. (Tr. 187.) No management official at the Middlesboro facility was consulted about Respondent's decision to close it. (Tr. 196, 205, 235, 264, 320.)

Hilliard and Parke came to the Middlesboro on September 15 to announce the closure of the Middlesboro facility to Respondent's other employees in a series of small group meetings. (Tr. 20, 63, 106, 155–156, 205, 264, 394, 475–476.) What was said at these meetings is not largely in dispute. Employees testified that Parke told them that Respondent was closing the Middlesboro facility because of logistics (the plant was too far from the Interstate) and because Respondent did not need so many plants in that region of the United States. (Tr. 66, 78, 89, 156.) One employee also remembered Parke stating that the Middlesboro plant was old and landlocked and that some jobs were being relocated to Ohio and Georgia. (Tr. 96.) Parke told employees that Respondent was building a technology and manufacturing facility in the Knoxville area and that 1/3 of Middlesboro's manufacturing volume was going to a facility in Georgia, 1/3 to Ohio, and 1/3 to the new facility. (Tr. 476–477.) Employees were not told that they could transfer to Clinton or the other facilities.[12] (Tr. 482–483.)

Respondent did not discuss the possibility of job transfers with most employees. (Tr. 491.) Instead, Parke stated, the management team discussed and evaluated the non-bargaining unit employees to decide who would be offered a position in Clinton. (Tr. 491.) Several employees asked Wilhoit and Roark about working in Clinton. Wilhoit told them to go to Clinton and apply and suggested they carpool. (Tr. 198.) No one told Wilhoit that employees needed to go to Clinton to apply. Roark told these employees that he heard they were having a job fair in Clinton and that anyone interested was more than welcome to apply.[13] (Tr. 236.) Roark also testified that, "even after the plant closed, we tried to get several of them [to] go down there and talk to them and apply for a job." (Tr. 241.) When asked who from Middlesboro was offered a job in Clinton, Roark testified, "basically everyone. They were told they could go to the job fair." (Tr. 243.) When asked how many employees from Middlesboro got jobs in Clinton, Roark stated none. (Tr. 243.)

Chari testified that he believed that skilled employees from Middlesboro transferred to Clinton, although he could not name any specific employees. (Tr. 330.) He believed we "threw it open" to people from Middlesboro who wanted to go to Clinton and that "they were given the opportunity." (Tr. 330.)

Respondent considered hiring a labor consultant, Richard Russell to assist in hiring and antiunion training. (GC Exh. 17; Tr. 529.) Ultimately, Respondent did not hire Russell. (Tr. 533.)

G. Confidentiality Agreements

Two hourly employees, Sean Chapman and David Ramsey, from Respondent's Middlesboro facility left to work at the Clinton facility before the Middlesboro facility closed. (Tr. 196.) These employees transferred and were not required to complete new employment applications. (Tr. 196–197; 543.) Several of Respondent's supervisors, including Roark, Calhoun, Jackson, and Wasson, transferred from Middlesboro to Clinton. (Tr. 199–200, 445.) They did not fill out new job applications in order to transfer. (Tr. 239, 258, 445.) Wilhoit provided these employees and supervisors with confidentiality agreements to sign.[14] (Tr. 196–197.)

Chapman, who worked as a line operator (or "line boss") in Middlesboro, holds the same position in Clinton as he did in Middlesboro. (Tr. 202, 536.) Chapman met with Wilhoit in September and she told him that there would be a job for him at Clinton if he was interested. (Tr. 539.) Wilhoit then handed him a piece of paper to sign.[15] (GC Exh. 1(dd); Tr. 538, 540). Wilhoit advised Chapman not to talk about the Middlesboro plant shutting down, his position in Clinton, or his wages with anyone. (Tr. 542.)

By signing the confidentiality agreement, Chapman agreed that he would not reveal any confidential information to third parties. (GC Exh. 1(dd), att. A.) The confidentiality agreement specifically defined "confidential information" as:

> business plans (including particularly, but not limited to, Dura-Line's plans for locating a facility in Clinton, Tennessee and its plans related to how other plants and locations may be impacted by the opening of the new facility), financial information regarding the business (including pricing, performance, revenue, sales projections, and other similar financial information regarding the status, performance and plans of Dura-Line), sales and marketing plans and projections, and

[12] Parke used talking points in these meetings, but he did not prepare them. (R. Exh. 7; Tr. 407, 476, 480.) Chari had input into the talking points. (R. Exh. 5; Tr. 315–316.) Parke did not read from the talking points, instead referring to them before each meeting. (Tr. 476.) The testimony of Hilliard and Parke diverged regarding preparations for and the conduct of these meetings. In this instance, I credit the testimony of Parke because it is more consistent with the testimony of other witnesses and because I found him to be a more credible witness than Hilliard.

[13] Roark said "they" told him that employees could attend a job fair, but did not identify who "they" were. (Tr. 236–237.)

[14] Employee Sean Chapman indicated that 8 to 15 employees or more transferred to Clinton and that Respondent is still hiring there. (Tr. 544.) Wilhoit testified that 3 or 4 Middlesboro employees were hired to work in Clinton. (Tr. 196.) Employees who transferred to Clinton, other than Chapman, Ramsey, Wilhoit, Roark, Calhoun, Jackson, Wasson, and a shipping manager were not identified in the record.

[15] Chapman was unsure of the date he signed the confidentiality agreement. He testified that he did not sign it on September 15, the date indicated on the form. (GC Exh. 1(dd); Tr. 540.) Chapman believed he signed the agreement after he returned from his honeymoon, on about September 21. (Tr. 538.)

> software code or practices. . . "Confidential Information" does not include information that is available via public sources, or that has been legitimately released into the public arena.

Chapman did not discuss his transfer to Clinton with anyone other than Wilhoit. (Tr. 541.) He was not sure of the consequences for violating the confidentiality agreement. (Tr. 543.)

According to Hilliard, Respondent wanted its employees to sign such agreements in order to keep the Middlesboro facility running, to avoid "scuttlebutt conversations," and because Respondent had not identified all of the employees who would be transferring to Clinton. (Tr. 394.) Hilliard further testified that bargaining unit members were not offered transfers to the Clinton facility because the issue would be dealt with during effects bargaining.

H. The Press Release

Respondent received funds from the State of Tennessee to fund development of the Clinton facility. (Tr. 483.) The State brought pressure on Respondent to issue a press release. However, Hilliard sought to delay making a public announcement regarding the opening of the Clinton facility. (Tr. 483–484.) In an email to Parke, Jenkins, and others on September 1, Hilliard stated that, "an announcement will only make our labor negotiations with the Steel Workers [sic] Union more challenging." (R. Exh. 8.) Hilliard stated that he was concerned because of customer demand and commitments and the need to keep the Middlesboro facility running through December. (Tr. 397–398.) Hilliard later stated, "Confidentially. . .today, Clinton hasn't been an [issue] at the bargaining table and we would prefer to keep it that way." (R. Exh. 10.) Parke echoed Hilliard's testimony that Respondent wanted a structured, well-timed announcement and that one of its concerns was information getting to the Union. (Tr. 493.)

On October 15, Tanya Kanczuzewski[16] sent an email to Parke, Hilliard, and Jenkins seeking information for a press release. (GC Exh. 15.) Hilliard agreed with the release, but asked that nothing appear in the press before October 16, the end of the first week of effects bargaining with the Union. Hilliard later responded to Kanczuzewski indicating that he, Chari, and Respondent's attorney were aligned with the message in the press release, but they had "concern[s] with broadcasting the 70 hires for Clinton." (GC Exh. 15.) He also stated that Clinton had not been an issue at the bargaining table and "we would prefer to keep it that way." (Id.)

I. Bargaining Requests and Bargaining

In September, the International Union was notified by R. Hatfield that he had received a WARN notice. (GC Exh. 6; Tr. 549–550.) The notice, dated September 29, indicated that work would cease at the Middlesboro facility between December 16 and 31. The notice further indicated that the closure would be permanent. The notice did not mention that work from Middlesboro was being relocated to other plants.

On September 21, almost a week after Respondent announced the Middlesboro closure to employees, Respondent's attorney Howard Jackson sent a letter to the International Union. (GC Exh. 18.) In his letter, Jackson indicated that Respondent "understands that we will need to engage in bargaining over the impact of [the decision to close the Middlesboro facility."] (Id.) Jackson went on to ask when the Union would like to begin effects bargaining. Id. On September 24, International Staff Representative Terry Sims sent a letter to Jackson seeking dates for effects bargaining. (GC Exh. 19.)

Respondent and the Union met to bargain over the effects of the plant closure on three occasions: October 12, November 9, and December 16. (Tr. 23; 559.) Present for the Union were several employees, including R. Hatfield and Freddie Chumley, as well as International Union Representative Sims. (Tr. 23.) Wilhoit and Jackson attended on behalf of Respondent. (Id.) Severance was discussed at these meetings. (Tr. 24.) The Union did not make any proposals regarding employee transfers to other facilities. (Tr. 556.)

During these sessions, Respondent did not mention that it was relocating unit work to the Clinton facility. (Tr. 560.) However, Sims located an article indicating that Respondent was opening a facility in Clinton and was seeking to hire workers. (GC Exh. 7.) During the bargaining sessions, Respondent never mentioned the relocation of unit work to Clinton or other facilities. (Tr. 560.)

On November 2, Sims sent a letter to Jackson seeking to bargain over Respondent's decision to close the Middlesboro facility. (GC Exh. 20.) Sims also requested information regarding the specific reason for moving operations to Clinton, the amount of any labor cost savings caused by such a move, and the amount of any savings Respondent would realize by moving. (Id.)

In his response on November 23, Jackson stated that Respondent declined to bargain over the decision to close the Middleboro facility because it was not the sort of decision amenable to change via collective bargaining. (GC Exh. 21.) Jackson indicated that Respondent's decision was made based on its determinations regarding capital investment in the present and future, as well as how to serve its customers by producing product in the most advantageous manner and locations. Id. Jackson went on to describe that some of the production work from Middlesboro would be transferred to other locations and that Clinton would also have a research and development component. Id. He also noted that the company did not anticipate any labor cost savings and that the decision to close the Middlesboro facility was not based on labor cost savings. Id. Respondent and the Union never bargained over the decision to close the Middlesboro facility. (Tr. 553.)

It is undisputed that Respondent did not seek concessions from the Union prior to reaching its decision to develop the Clinton facility and transfer unit work away from Middlesboro. Chari testified that even if the Union offered concessions, it would not have changed Respondent's need to open the Clinton facility. (Tr. 312.) Respondent felt that the Middleboro facility was no longer workable. Even if the Union negotiated a decrease in labor costs, Tomaszek explained, the Middlesboro plant still could not be expanded. (Tr. 503–504.) However, Respondent could have negotiated with the Union regarding the

[16] Kanczuzewski was Respondent's "communications person" at the Clinton facility. (Tr. 397.) She did not testify at the trial.

restriction on operating around-the-clock in Middlesboro. (Tr. 344.)

J. The Thanksgiving Bonus

Respondent maintained a Thanksgiving bonus program at the Middlesboro facility. Employees were given a $25 gift card to a local food store in the years preceding 2015. (Tr. 29, 109, 133, 160, 208, 555.) Bargaining unit employees testified that the gift card amount had always been $25.[17] (Tr. 29–30, 110, 160.)

In April 2015, Respondent posted a notice regarding employee recognition on the bulletin boards in the Middlesboro facility. (GC Exh. 5; Tr. 110.) This notice was dated April 23, and was approved by Hilliard and Parke. The notice indicated that the amount of the Thanksgiving bonus would be $25.

Respondent's collective-bargaining agreement with the Union specified a $16 Thanksgiving bonus. (R. Exh. 1, p. 31.) As such, Wilhoit testified that she had previously asked permission from Respondent's corporate office to award $25 to the union-represented employees at Middlesboro. (Tr. 208.) Wilhoit did not identify from whom she received such permission.

In 2015 Wilhoit did not receive permission in time to purchase the gift cards and was advised by Tamera Fraley, Respondent's Human Resources Director, to "just go by the contract." (Tr. 209.) It is not disputed that Respondent distributed $16 gift cards to bargaining unit members in 2015. There is no evidence in the record that Wilhoit ever advised the Union of the decreased amount of the 2015 Thanksgiving bonus.[18]

K. Respondent's Operations after the Closing of the Middlesboro Facility

MicroDuct and FuturePath are now manufactured in Clinton. (Tr. 237.) Three full lines of equipment were transferred from Middlesboro to Clinton. (Tr. 240.) This equipment had been in Middlesboro for 10–15 years before being moved to Clinton. Additionally, Clinton is located 4–5 miles off of Interstate 75.[19] Unlike the Middlesboro facility, the Clinton facility operates around-the-clock. (Tr. 326.)

The production lines in Middlesboro were 90 to 100 feet long and those in Clinton are 220 feet long. (Tr. 466.) The equipment in use in Clinton would not have fit inside the Middleboro facility. (Tr. 299, 480–481.) These new lines run faster and produce more product than the lines in Middlesboro. (Tr. 237–238; 481.) Chari also testified that the production of MicroDuct and FuturePath is now highly skilled, whereas it was done "the old-fashioned way" in Middlesboro. (Tr. 329.)

The plan to develop the Clinton facility included plans for a rail spur; however, it had not yet been completed by the time of the hearing. (Tr. 515.) Chari testified that a rail spur was not necessary in Clinton because no standard conduit is manufactured there and the manufacture of standard conduit requires a great deal of resin. (Tr. 345–346.) However, Tomaszek testified that having a rail spur in Clinton was important because it provided a cost savings over bringing the resin in by truck. (Tr. 507.)

Standard conduit is now manufactured in Ohio and Georgia. According to Respondent Exhibit 6, Sch. A-1-4, 5 lines from Middlesboro were moved to GA-South and 4 lines from Middlesboro were moved to Ohio. These lines were improved and lengthened when they were moved. (R. Exh. 6; Tr. 512.) Middlesboro was only able to produce 600 pounds of product per hour due to the short length of the building. (R. Exh. 3; Tr. 290.) The Ohio facility alone produces 1200 lbs./hr. (Tr. 329.) Both the Ohio and Georgia facilities are larger than the Middlesboro facility. (Tr. 514.)

Chari admitted that the Middlesboro facility was profitable, in fact it was Respondent's most profitable facility; however, Chari attributed this to the high margin nature of the MicroDuct and FuturePath business. (Tr. 333, 514.) Tomaszek agreed that Respondent's plans to close Middlesboro and transfer its work elsewhere made production even more profitable. (Tr. 514.)

The Middlesboro facility ceased production in late December, but some employees stayed on to complete cleanup activities. (Tr. 26.)

L. Alleged Threats

The complaint alleges that several of Respondent's supervisors and/or agents made threats of plant closure to employees between June and November 2015. The General Counsel produced evidence of Respondent's dislike for R. Hatfield that predated this period, but these instances are not alleged as unfair labor practices. The General Counsel further produced evidence of other alleged instances of antiunion animus on the part of Respondent, which are provided as background, but not alleged as unfair labor practices. Respondent denies that the alleged threats were made and further denies the supervisory and/or agency status of Clifton West and William Calhoun.

1. Patsy Wilhoit

In April 2015, R. Hatfield came to Wilhoit and inquired about a transfer to another of Respondent's facilities. (Tr. 190.) She advised Hatfield to contact the human resources person at the other facility. Wilhoit then mentioned R. Hatfield's request to Tamera Fraley.[20] Although Wilhoit indicated that she would like nothing more than for R. Hatfield to transfer, she said she could not in good conscience recommend him. (GC Exh. 10.) In her email exchange with Fraley, Wilhoit mentioned a concern that R. Hatfield might be moving in order to organize the other facility. (GC Exh. 10.) Wilhoit referenced past and pending grievances in this same email to Fraley.[21] (Id.)

In June 2015, Wilhoit and Maggie Brock, an administrative assistant, exchanged emails about the suspension of a bargain-

[17] Wilhoit maintained that the Thanksgiving bonus had been $25 for only the 2 or 3 years preceding 2015. (Tr. 208.) In this instance I credit the testimony of Respondent's employees, who I found to be more reliable witnesses than Wilhoit.

[18] Wilhoit testified that she did not remember whether she notified the Union of the decreased amount. (Tr. 218.) Sims testified he was not notified of the decreased amount. (Tr. 555.) Given Wilhoit's lack of memory on the subject, I credit the testimony of Sims.

[19] Middleboro is located 2 miles off of Highway 25E, a 4-lane highway. However, the nearest controlled access Interstate highway to Middlesboro is about 60 miles away. (Tr. 245, 257.)

[20] Fraley is Respondent's corporate human resources director and reports to Hilliard. She did not testify at the trial.

[21] This exchange is not alleged as an unfair labor practice.

ing unit employee. (GC Exh. 11.) In the exchange, Brock referred to R. Hatfield as a "first class dummy."[22] (Id.)

In that same month, a cousin of R. Hatfield died. (Tr. 147). When R. Hatfield returned to work after the services, his supervisor told him that he would be disciplined or suspended for missing work. (Tr. 148.) R. Hatfield went to see Wilhoit. Wilhoit was not aware of the bereavement policy contained in article 18 of the contract between the Union and Respondent. (R. Exh. 1; Tr. 147.) Hatfield pointed out the policy, which allows for 1 day off in the event of the death of a relative not specifically listed in the article. (R. Exh. 1; Tr. 149.) In response, Wilhoit said, "This is the type of shit that's going to get you guys out of job and get the facility shut down." (Tr. 149.)

In addition, Elmer Evans, a former union steward, secretary, and president, testified about numerous conversations with Wilhoit regarding R. Hatfield. Evans testified that every time he spoke to Wilhoit she mentioned that R. Hatfield was filing too many grievances. (Tr. 117.) Wilhoit told Evans that someone needed to talk to R. Hatfield about filing grievances and that every time a grievance was filed, it cost the company $50 to have its lawyers look at it. (Tr. 117–118.) Evans testified that Wilhoit told him that, "if something's not done with Robert [Hatfield] . . . we've got new owners . . . Mexichem and they're not liking this company already because it's union, and if something's not done with Robert and if Robert doesn't stop filing grievances as much as he does, we're going to shut it down and move." (Tr. 118.)

Employee Freddie Chumley testified that Wilhoit told him that every time the Union filed a grievance, she was required to put it in the system. (Tr. 19–20.) Wilhoit also told him that these grievances were seen by the people in Knoxville and they did not like it. (Id.) Wilhoit admitted entering the grievances into a shared drive, but did not know if anyone outside of Middlesboro ever looked at them. (Tr. 210.) Wilhoit further admitted making Fraley aware of grievances that might go to arbitration. (Tr. 210.)

Wilhoit specifically denied having the conversations with Evans detailed above. (Tr. 209.) She further denied ever telling anyone that the plant would close as a result of the Union or its grievance filing. (Tr. 205–206, 209.)

2. Mike Roark

Roark began working for Respondent in Middlesboro in 1996. He served as the production manager in Middlesboro beginning in 2014. He became interim plant manager in 2015. Roark transferred to Respondent's Clinton facility, but not in the same position. (Tr. 237.) In Clinton, Roark works in research and development and trains employees on new computerized equipment. (Tr. 237.)

In April 2015, shortly after the signing of Respondent's last contract with the Union, Evans had a conversation with J. Hatfield and Roark. (Tr. 121.) Evans said, "I guess we got 3 more years. We'll be here 3 more years." (Tr. 121.) J. Hatfield replied, "You better enjoy it because it's your last contract here." Roark then stated, "I guarantee it'll be your last contract."[23] (Tr. 122.)

In August 2015, R. Hatfield filed a grievance with Roark on behalf of another employee alleging that the employee was being forced to do work contractually required of other employees. (Tr. 150.) According to R. Hatfield, Roark told him, "[R. Hatfield] was going to have to have bodyguards to escort [him] to and from work." (Tr. 151.) R. Hatfield asked Roark what he meant by this. Roark replied that if he wanted to get rid of him [R. Hatfield], there was nothing that anyone, including the union and the labor board, could do about it.

Roark testified that he wrote up two employees and R. Hatfield filed grievances for them. Roark admitted stating, "Well, okay, Robert . . . but you're going to need a bodyguard from your house to over here from these guys out on the floor that's been coming to me complaining about the other guys not showing up for work." (Tr. 234.) Roark testified that he laughed when he made this statement and that he explained to R. Hatfield that it was just a joke. (Id.)

In September 2015, before the plant closure announcement, R. Hatfield filed a grievance with Roark on behalf of an employee terminated for attendance issues. Roark became animated and stated, "those grievances was (sic) the type of things that was going to get the doors closed on the facility. We were all going to be out of jobs [and] said that [R. Hatfield] needed to quit coming in and filing grievances for guys like that." (Tr. 159.) Roark did not specifically testify about this conversation. However, Roark denied telling employees that the plant would close because of the Union. (Tr. 230.)

3. Bruce Wasson

R. Hatfield testified that in September 2015, after a disciplinary meeting regarding two employees, Wasson followed him outside to the parking lot and said, "You guys are going to get what you want, they're going to shut the doors, and you guys are going to be out of a job." (Tr. 154.) This encounter occurred before the shutdown of the Middlesboro facility was announced to Respondent's unit employees. Id.

Chumley, a former union president, testified that Wasson made numerous comments to him regarding the Union and its grievance filing. Wasson told Chumley that Mexichem would not tolerate grievances and Dura-Line would shut down. (Tr. 43.) Regarding grievances, Wasson told Chumley, "What do they think they're doing? They're going to get this plant shut down." (Tr. 16.) Wasson also told Chumley that a union field representative, "already got one place shut down in town" and Dura-Line would be next. (Tr. 16.) Following the plant closure announcement, Wasson told Chumley, "I told you it was coming." (Tr. 22.)

Chumley filed a grievance with Roark regarding the number of days worked in a row by employees on 12-hour shifts. (R. Exh. 1, Art. 28; Tr. 44.) Respondent settled the grievance. Wasson, however, was incensed about this grievance, telling

[22] Brock did not testify at the trial. This exchange is not alleged as an unfair labor practice.

[23] Neither Roark nor J. Hatfield testified about this exchange and it is not alleged as an unfair labor practice. However, from this statement, as well as Roark's e-mail in GC Exh. 12, I infer that Respondent's managers knew or suspected that the Middlesboro facility would close prior to August.

Chumley, "I can't believe Robert filed that." (Tr. 45.) When Chumley told Wasson that he [Chumley] had filed the grievance, Wasson replied, "When we're all out of job, I guess we can flip burgers." (Tr. 46.) Wasson also frequently told Chumley that Tim Dean, a former union representative, got another plant closed in Middlesboro and the Respondent would be next.[24] (Tr. 16.)

Employee Matthew Craig had a conversation with Wasson on September 29. Craig testified that Wasson stated that one of the reasons that Respondent was closing the facility was because the company can't run the facility the way they want to run it. (Tr. 108.) Wasson added that the reinstatement with backpay of two employees, as well as a big pile of grievances from the Union, were among the main reasons for the shutdown. (Tr. 108.)

Evans had numerous conversations with Wasson regarding the Union. Wasson told Evans that the Union was ruining Dura-Line. (Tr. 123.) He went on to state, "If Robert [Hatfield] does not quit doing what he was doing . . . Mexichem . . . don't like the Union and it's the only union plant they got, so you all figure it out." (Tr. 123–124.) Wasson went on to state that if R. Hatfield continued filing grievances, thereby costing the company money, we are going to shut this place down.[25] (Tr. 124.)

Wasson denied telling employees that the Union or grievances filed by the Union were the reasons for Respondent closing the Middlesboro facility. (Tr. 435.) No one from Respondent's corporate headquarters ever told Wasson that the Union or its grievance filing caused the closure of the Middlesboro facility. (Tr. 435.)

4. David Jackson

R. Hatfield had a conversation with David Jackson in Respondent's parking lot. No one else was present. Jackson told R. Hatfield that he told other employees that it was R. Hatfield and the Union that caused the shutdown of the Middlesboro facility. (Tr. 157–158.) Jackson asked what was the matter with him [R. Hatfield]. (Tr. 158.) Jackson then stated that R. Hatfield couldn't take a joke and was being a big baby.[26] (Id.)

5. Jeff Hatfield

Employee Bobby Philpot had a conversation with Shift Supervisor J. Hatfield a few days after Respondent announced the closing of the Middlesboro facility. (Tr. 67.) Philpot asked J. Hatfield why Respondent was closing the plant, to which J. Hatfield replied, "basically because [of] all the grievances." (Tr. 68.) J. Hatfield testified that he never told anyone that the plant's closing was related to the Union. (Tr. 424.)

6. Clifton West

Philpot had a conversation with West 5 to 10 minutes after a meeting at which the plant closure was announced. Employee Paul Green was also nearby. West was upset and stated, "I told Robert [Hatfield] if he . . . doesn't quit with all of these grievances . . . they're going to shut this place down." (Tr. 66.)

According to West, a few days after the announcement of the plant closure, he was approached by R. Hatfield, Paul Green, and a few other unit employees. West testified that R. Hatfield stated, "Yeah, I'm the reason why they shut down, and I got more for them." (Tr. 266.) West testified that he never said the closure was due to R. Hatfield filing grievances. (Tr. 265.)

7. William Calhoun

Employees Phillip Smith and Dennis Lane testified regarding a conversation with Will Calhoun. Smith testified that another employee asked Calhoun why Respondent was shutting the plant down. Calhoun replied that the main reason was because of the Union and the grievances it filed. (Tr. 91.) Calhoun also mentioned that Middlesboro was Respondent's only unionized plant. Calhoun stated that R. Hatfield filed all kinds of grievances and he and Wilhoit were not "meshing." (Tr. 93.)

According to Lane, Calhoun stated that the reason for the shutdown was 50 percent Patsy [Wilhoit] and 50 percent Robert [Hatfield]. (Tr. 102.) Lane testified that he responded, "it's 75 Patsy and 35 Robert." (Tr. 103.) Lane testified that Calhoun then shrugged his shoulders and walked off. Id.

Calhoun did not testify regarding this specific conversation. However, he testified that when he was asked about the closure by employees, he said that there were several reasons: (1) shipping costs out of Middlesboro; (2) the lack of room for expansion at Middlesboro; and (3) dealing with the Union. (Tr. 257, 260.) Calhoun stated that this last reason was his personal opinion and that no one from Respondent's corporate headquarters ever mentioned the Union as a reason for a shutdown. (Tr. 257.)

M. Destruction of Property

Freddie Chumley was employed at the Middlesboro facility as an electrician for about 4 years and served briefly as local union president in 2014 or 2015. (Tr. 15.) He was injured on the job in August 2015. Chumley's workers' compensation claim was initially denied, causing him to use vacation time and Family and Medical Leave Act (FMLA) leave. As a condition of his FMLA leave, Chumley was required to turn in medical paperwork every 2 weeks. (Tr. 31.)

On December 1, Chumley came to the Middlesboro facility to turn in his FMLA paperwork and had an opportunity to view his work area. He described his work area as a small, waist-high fabricated steel cage. (Tr. 33.) When Chumley visited his work area on December 1, the cage was intact and locked; Chumley had the only key. (Tr. 52.)

Chumley kept a George Foreman grill, a coffeemaker, and personal tools at the Middlesboro facility. The grill was kept locked in his cage. The coffeemaker was kept in Wasson's office in the maintenance shop. The grill and coffeemaker were used by all of the employees in the maintenance area. Chumley testified that the grill and coffeemaker were in good working order when he last saw them. He kept a locked, red toolbox on top of his cage. (Tr. 33–34.) Chumley kept personal and company-owned tools in the toolbox. Chumley also kept a 5-gallon bucket, which he used to carry equipment to change out items in the plant. (Tr. 565.) Chumley testified that he did not take

[24] Wasson's statements to Chumley are not alleged as unfair labor practices.

[25] Only Wasson's statements to R. Hatfield and Craig are alleged as unfair labor practices.

[26] Jackson did not testify at the hearing.

his personal property home when he started his medical leave because he assumed he would eventually return to work.[27] (Tr. 57.)

When Chumley came to the facility on December 1, he went to Wasson's office but Wasson was not there. (Tr. 32.) He then went to the main office and found West. (Tr. 32.) Chumley asked West to give his FMLA paperwork to Wilhoit and asked where everyone was. (Tr. 32.) West told Chumley that everyone [Roark, Wilhoit, Maggie Brock, and Wasson] had been called to Knoxville. (Tr. 52.)

On December 2, Chumley received a call from employee D.J. Witt. Witt advised Chumley that his grill and coffeemaker were in the dumpster. (Tr. 35, 129–131.) Witt sent Chumley text messages containing pictures of his items in the dumpster. (GC Exh. 2.) Chumley drove to the facility that evening and everything was gone from his work area. Chumley did not want to risk going into the dumpster to recover his items because the grill and coffeemaker were clearly broken. He also noticed that his cage and toolbox were gone.

Employee Rick Ballew testified that he saw another employee [Ramsey] with Chumley's toolbox in early December. Ballew asked Ramsey where he got the toolbox, to which Ramsey replied that he had been given the toolbox by Wasson. (Tr. 80–81.)

Wasson, who was Chumley's supervisor, admitted to throwing Chumley's grill and coffeepot into the dumpster. (GC Exh. 1(ii), para. 7(a); Tr. 437.) He testified that he did so as part of the effort to clean out the maintenance area in anticipation of the December closing of the Middlesboro facility. (Tr. 437, 441–442.) Wasson testified that the grill was already broken when he threw it away.[28] (Tr. 440.) Wasson denied unlocking Chumley's work cage and instead testified that Chumley did so. (Tr. 441.) Wasson gave an affidavit to the Board in an unfair labor practice case on December 1, the day before he threw out Chumley's items. (Tr. 439.) While giving his affidavit, the Board agent questioned Wasson about a conversation he had with Chumley regarding union representative Tim Dean getting another facility closed down near Middlesboro. (Tr. 449–450) Wasson could not say why he did not contact Chumley to pick up his property before disposing of it.

Wasson testified that Chumley had only company-issued tools, which were never returned to Respondent, in his work area. (Tr. 438.) He further stated that Chumley gave his tools to another employee. (Id.) He disputed that December 2 was the date when he threw out Chumley's items. (Tr. 440.)

N. Supervisory or Agency Status of Calhoun and West

As indicated above, Respondent disputes the supervisory status of William Calhoun and Clifton West. West began his employment with Respondent in 2007 and held several positions. Notably, he became a floor supervisor in 2010. He worked as a backup scheduler while he was a floor supervisor. He was later promoted to full-time scheduler, but continued to serve as a supervisor when needed. (Tr. 47; 272–273.) As the scheduler, West checked Respondent's systems dealing with the sales force and scheduled what the lines would run on the floor. (Tr. 269.)

West estimated that he spent 95 percent of his time as scheduler and 5 percent as a foreman. (Tr. 263.) He served as a supervisor, "every couple of weeks, if that." (Tr. 273.) When serving as a substitute foreman, West was able to discipline employees. (GC Exh. 3, 4, 8, 9; Tr. 69–70, 267.) West also had the authority to grant employee requests for time off and let employees leave work early. (Tr. 70.)

Calhoun has been employed by Respondent for 3-½ years. (Tr. 255.) He served in the position of quality manager in Middlesboro. (Tr. 255.) Calhoun oversaw 5 quality technicians. (Tr. 255.) In addition to supervising 5 quality technicians, who were not part of the bargaining unit, Calhoun ensured that procedures were followed and paperwork was properly completed. (Tr. 255.) Calhoun had authority to discipline the technicians working under him. (Tr. 258.) Calhoun said that he could recommend discipline for unit employees to their supervisors, but that his recommendation would have no weight. (Tr. 259.) According to Smith, a unit member, when he was assigned to work in the quality department, he received his tasks from Calhoun. (Tr. 96.) Smith stated that employees could not refuse these assignments.[29] (Tr. 94–95.)

DISCUSSION AND ANALYSIS

A. Credibility Analysis

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. I generally credited the witness accounts which seemed most plausible and were corroborated by other testimony or documentary evidence.

Respondent's witnesses testified repeatedly that the Union or its grievances were never mentioned in meetings where the decision to close the Middlesboro facility was discussed; however, none of these witnesses ever specifically testified as to what was said at these meetings. Respondent's witnesses could not agree on whether a full complement of employees had been hired at Clinton. They further disagreed on issues such as whether employees were offered transfers to the Clinton facility and whether an analysis of labor costs was made as part of the decision to transfer the work of the Middlesboro facility else-

[27] Wasson testified that he did not remember seeing a red toolbox in Chumley's work area, but it was possible it was there. (Tr. 441.)

[28] I credit Chumley's testimony that these items were not broken the last time he saw them over Wasson's testimony that the items were already broken when he disposed of them. (Tr. 440, 563.) I found Chumley to be a more reliable witness for reasons set forth in the credibility section of this decision.

[29] Calhoun was not asked about his authority to assign work to unit members.

where.

Initially, I did not find Patsy Wilhoit's testimony credible. She gave vague testimony regarding the Thanksgiving bonus. She did not identify who at Respondent's corporate headquarters gave her permission to grant a greater bonus amount than that specified in the parties' contract. She further qualified some of her testimony by stating "best I can remember" or "I believe." (Tr. 185, 196, 197, 198, 201, 212, 213.)

Wilhoit also gave contradictory testimony. For example, she initially testified that she did not recommend R. Hatfield for a transfer to another of Respondent's plants because of an attendance issue. (Tr. 191.) Only after being confronted with an email she wrote did Wilhoit admit that she said R. Hatfield might try to organize the other plant. (GC Exh. 10; Tr. 191.)

Wilhoit further could not give specific testimony regarding the issue of employee transfers, which I find highly unusual given her position as the highest ranking human resources manager at the Middlesboro facility. She engaged in the following exchange with the General Counsel:

> Q: Do you have any idea how many of the Middlesboro employees were hired in Clinton?
>
> A: I just heard rumors of this one or that one going, maybe three or four employees.
>
> . . .
>
> Q: There were a group of employees that were hired before the Middlesboro facility was actually shut down, correct, in Clinton?
>
> A: I don't know what they had hired before. I know a few of ours left before it shut down. A couple of our line leads left before December.
>
> Q: Who would that have been? A:Sean Chapman was one, and I believe David Ramsey.
>
> . . .
>
> Q: Is there any reason other employees were not permitted to transfer to Clinton?
>
> A: I had several employees that would ask about going to work at Clinton, and I told all of them they're taking applications; go down and apply.

(Tr. 196–198.) Wilhoit never explained why certain employees were allowed to transfer and others were not. Therefore, I did not credit Wilhoit's testimony, except where it was inherently plausible.

Furthermore, I did not find Roark's testimony credible. Initially, I do not accept his testimony regarding his email to Velasquez. On July 28, allegedly before the closure announcement to management, Roark sent an email to Velasquez after Velasquez announced his resignation. Roark's reply stated, ". . . I do understand Paul. And don't blame you. We all know what's going to happen in KY." Roark testified that his reply was referring to a previous occasion when Respondent's plant manager resigned and he [Roark] was asked to serve as interim plant manager. This explanation defies logic. It is not at all clear why Velasquez would care how his departure would affect Roark. Moreover, Roark's statement that "we all know what is going to happen in KY" does not seem to bear any relation to Roark's anticipated service as interim plant manager. It is far more plausible that Roark was alluding to the impending plant closure.

Roark also contradicted himself under cross-examination. Roark initially testified that he filled out a new employment application before he transferred to Clinton. (Tr. 239.) He almost immediately backtracked and said that he did not fill out a new application for employment. (Tr. 239.)

Roark's testimony was sometimes confusing. For example, he initially remembered Parke saying that the plant was closing because of the age of the equipment, the building being landlocked, the facility being so far off the Interstate, and that Respondent could not maintain the facility and remain competitive. (Tr. 231.) A short time later, he engaged in the following exchange with the General Counsel on cross-examination:

> Q: . . . when Mr. Jackson was asking you questions, I believe you testified about the meeting in September when Mr. Parke and Mr. Hilliard came down to announce the closure to the employees. You had mentioned the interstate routes as well as it costs a lot more to run things, I believe was your testimony. Is that accurate?
>
> A: It costs more per pound because of low production, the low output.
>
> Q: My question is, was that what the employees were told at this meeting?
>
> A: No.
>
> . . .
>
> Q: You discussed the fact that it was hard to maintain profit, productions, levels were lower in Middlesboro. Again, my question is were those comments your comments, or were they descriptions of what Mr. Parke and Mr. Hilliard told the employees in September.
>
> Q: It was based on that because the plant was smaller, the equipment was older, more breakdowns, couldn't be run as fast. The plant was such that the size that nothing else could be done with it because it couldn't be made any larger.

(Tr. 248–249.) Roark never responded to the questions regarding what was said by Parke and Hilliard during the closure announcement meetings. (Tr. 249.) Based on the foregoing, I credited the testimony of other witnesses over that of Roark, unless Roark's testimony was inherently plausible or uncontradicted.

I found William Calhoun to be a generally credible witness. Calhoun's brief testimony was not materially contradicted by other evidence or witnesses. He further testified in a sincere and straightforward manner. Therefore, I have credited his testimony.

I did not find Clifton West's testimony to be credible. His brief testimony was contradicted by the testimony of other witnesses. Regarding his conversation with Philpot and Green, I have credited the testimony of Philpot because I found Philpot to be a more credible witness. In addition, West's testimony regarding this conversation on direct examination was given in generalities, rather than specifically testifying regarding what was said by each participant. When asked about what he told Green and Philpot about the reasons for the Middlesboro closure, West testified, "I just repeated back what they told us when they came down to give us the reason of the closure." (Tr.

265.) By contrast, Philpot described West as upset and testified that he said, "I told Robert [Hatfield] if he . . . doesn't quit with all of these grievances . . . they're going to shut this place down." (Tr. 66.)

I have not credited the testimony of West that R. Hatfield told people in town that he was responsible for the closing of the Middlesboro facility. Regardless of whether R. Hatfield believed he was responsible for the closure, I find it implausible that he would make such statements to others who would surely be angry over losing their jobs or to others who might know someone losing his or her job. Therefore, I have not credited the testimony of West except where it has been supported by another, more credible, witness or evidence, or where it was inherently plausible.

I further did not find Paresh Chari's testimony to be completely credible. Chari evinced a desire to remain on Respondent's message that the closing of the Middlesboro facility was not motivated in any way by the presence of the Union. He talked over the attorneys questioning him. (Tr. 314, 355.) He sometimes avoided answering questions directly, and asked to "elaborate." (Tr. 294, 304, 310.) I noticed Chari looking to Respondent's counsel at times as if to seek assistance when faced with difficult questioning.

Chari gave confusing testimony regarding Respondent's need for a rail spur:

> Q. Okay. You testified quite a bit about the rail spur.
> A. Yeah.
> Q. Is that currently in use in Clinton?
> A. We don't need it in Clinton because we don't do standard conduit. The – what I'm saying is, if you're making big, lots of standard conduit, you got lots of resin you need. MicroDucts need little resin. So it's almost irrelevant.
> Q. Okay.
> A. But where all the – most of our other facilities have railroad spurs, including the one over – including the ones overseas.
> Q. Okay. Maybe I misheard most of your testimony regarding the rail spur, but I thought that that was associated with Clinton, the Clinton facility being near a rail spur. Is that – do I – did I misunderstand your testimony?
> A. I didn't say that Clinton – I didn't say anything about a railroad spur in Clinton. But the answer is we –
> Q. So there's no rail spur near the Clinton facility?
> A. I think we probably will –

(Tr. 344–345.) The capital expenditure request for building the Clinton facility specifically mentions the need to build a rail spur at the site. (R. Exh. 4, p. 3.)

Furthermore, Chari gave contradictory testimony. His testimony that all employees from Middlesboro were given an opportunity to transfer to Clinton was contradicted by the testimony of Parke, Roark, and Wilhoit. Chari testified that no analysis of labor costs was performed in conjunction with the decision to relocate the work of the Middlesboro facility. (Tr. 360.) However, this testimony was contradicted by both Tomaszek and the capital expenditure request. (R. Exh. 6; Tr. 516.)

In summary, due to Chari's demeanor and contradictions in his testimony, I did not credit his testimony except where it was uncontradicted or inherently plausible.

I found Kenneth Kovacs to be a credible witness. He testified in a steady and thorough manner. Although his testimony was once contradicted by his own pretrial affidavit testimony regarding the date when the Clinton facility was acquired, I do not find that this minor misstep detracted from his overall credibility. He provided detailed testimony regarding the capital expenditure requests related to closing the Middlesboro facility and relocating its work elsewhere, which I credit.

I did not find the testimony of Hilliard credible. Hilliard was a difficult witness and he appeared uncomfortable while testifying. His hands shook while on the witness stand and he fiddled with a paperclip while giving his testimony. Hilliard sparred with Counsel for the General Counsel under cross-examination. (Tr. 403–405.) He further failed to give a cogent answer to questions regarding the press release and the number of new hires for the Clinton facility. (Tr. 408.) Under cross-examination, he engaged in the following exchange with the General Counsel:

> Q: And do you recall some discussion that the employer, Dura-Line, did not want to specifically state the number of employees that would be hired?
> A: Do I recall the discussion?
> Q: Yeah.
> A: It's been a while.
> Q: No. Take a look at Respondent's Number 10, please.
> A: Ten?
> Q: Uh-huh. In the middle of the first page. . .
> A: Okay . . .
> Q: Okay. So you didn't want to communicate the number of hires that would be at the Clinton facility, correct?
> A: No one knew the number of hires.
> Q: Well, you state here, "While I fully understand the desire to communicate the 70 hires for Clinton in the article, it would be ideal if we could get away without having to specifically state the number of hires."
> A: That number was not specifically known.

(Tr. 408–409.) This testimony makes no sense, as Hilliard wrote in an email in October 2015, that there would be 70 hires for the Clinton facility. (GC Exh. 15.) Furthermore, I do not find credible Hilliard's testimony that Respondent did not offer bargaining unit members transfers to the Clinton facility because he believed it would be dealt with in effects bargaining. This testimony was directly contradicted by an earlier email in which Hilliard said that Clinton had not been an issue at the bargaining table and he preferred to keep it that way.

Hilliard testified that he interacts with Chari daily. When asked whether Chari made comments regarding the Union, Hilliard gave the following, equivocal testimony, "Frankly none. Never really comes up, or rarely comes up. None. Zero." Either Chari never mentioned the Union or he did, and Hilliard's answer did not settle the issue.

Hilliard also testified that he lacked recall of certain key

events. For example, when asked about drafts of the talking points used by Parke in the closure meetings and about whether Respondent resisted revealing the number of hires for the Clinton facility, Hilliard twice replied, "It's been a while." (Tr. 408.)

I did not find J. Hatfield's brief testimony credible. He gave trial testimony that contradicted his earlier sworn affidavit testimony given to the General Counsel. At trial, J. Hatfield testified that he first heard about the closing of the Middlesboro facility from Parke. (Tr. 427.) However, in his affidavit, J. Hatfield testified, "Shortly after Mexichem bought Dura-Line, I heard another manager say that Mexichem decided to shut down Middlesboro before they even bought it." (Tr. 427.) J. Hatfield's efforts to disavow or explain away his earlier testimony were unavailing. He first admitted that he did hear about the shutdown, but not shortly after Mexichem purchased Dura-Line. He then stated that the Board Agent must have misunderstood him. Moreover, although he allegedly carefully reviewed the affidavit before signing it to make corrections, he testified that he must have missed this. He then stated that he did not make an effort to correct it. (Tr. 427–429.) J. Hatfield also testified, contrary to every other witness, that the amount of Respondent's Thanksgiving bonus in 2015 was $25. (Tr. 427.) Given this testimony, as well as J. Hatfield's argumentative demeanor on the witness stand and his unsuccessful attempt to disavow his pretrial affidavit testimony, I did not credit his trial testimony.

I further did not credit the testimony of Wasson. His testimony was given in an unsure and hedging manner. When asked if other employees' cages were still intact on December 2, Wasson replied, "There may have been David Boyles's, but he had a tool cart—not a cart, but a Craftsman push-around cart with tools that locks down. His was in there, yes." (Tr. 442.) He then engaged in the following exchange with the General Counsel:

> Q: So the only one that was cleaned out was Mr. Chumley's on that day, on December the 2nd, correct?
>
> A: I don't – I can't recall it being December the 2nd.
>
> Q: You don't recall it being the day you after you gave your statement?
>
> A: No, ma'am. No, ma'am.
>
> Q: But it could have been?
>
> A: I don't think so. But it – I mean anything's possible, yeah.

(Tr. 443.)

He was further argumentative with the General Counsel:

> Q: What about the other 11 or so employees there [in Clinton]? Do you know if they completed applications? Or did they just transfer?
>
> A: I'm sure they—I'm sure that they did because some of those were union employees from Middlesboro.
>
> Q: So the union employees had to complete applications in order to go?
>
> A: Like I said, I don't know if they did or not. I'm sure that they would have had to. I'm not privileged to the information of who fills out an application or who doesn't fill out an application.
>
> Q: So why are you sure that they would have had to? Were you told that?
>
> A: No. No.
>
> Q: Okay.
>
> A: It'd just be my thinking.
>
> Q: I mean, you didn't fill out an application?
>
> A: No, you're correct.
>
> Q: Okay. So why would the union employees have to fill out an application?
>
> A: That's not necessarily union employees. Everybody that's came down there that I know of besides management or that position in Middlesboro has had to fill out an application.
>
> Q: So how do you know they had to fill out an application, sir?
>
> A: Because they come in the door and there's applications filled out right there. I've never seen anybody fill one out.
>
> Q: Then how do you know these other employees completed applications?
>
> A: Okay. I do not know 100 percent for sure. I've never seen anybody fill one out. I've never asked anybody if they filled one out.
>
> Q: So you don't know.
>
> A: Correct.

(Tr. 446–448.)

I found Parke's trial testimony credible. He appeared candid while giving his testimony. Some of his testimony was sometimes contrary to the position of Respondent, such as his testimony that Respondent was concerned about information getting to the Union regarding the closing of the Middlesboro facility and the opening of the Clinton facility. (Tr. 493.) As such, I have credited the testimony of Parke over that of other of Respondent's witnesses.

Tomaszek was also a generally credible witness. Tomaszek contradicted Chari on the need for a rail spur. Tomaszek testified that Clinton needs a rail spur because it is considerably cheaper to acquire and bring resin to the plan via rail than it is to bring it by truck. (Tr. 506.) Tomaszek also candidly conceded that a comparison of labor costs was made as part of Respondent's decision to close the Middlesboro facility. Given Tomaszek's sure demeanor on the witness stand and the fact that most of his testimony was uncontroverted, I credit his testimony.

I found Lisa Jenkins to be a difficult witness. She had to be admonished to answer the questions asked of her. (Tr. 523.) She also engaged in the following colloquy with the General Counsel after this admonition:

> Q: Do you recall adding in . . . a proposal in [Grosso's] text that the Middleboro facility has the only union-represented workforce out of the 10 Dura-Line manufacturing locations?
>
> A: Whatever I wrote in the text of that, I was a brand new employee, it was coming to me through Juan Manuel [Urquiza] and Chuck [Parke]. So I basically just kind of

walked into the Company, so writing up that was taking data from others.

Q: Let me show you a document we have marked as General Counsel's Exhibit Number 16. If you would carefully review that and then identify that for the record?

A: Yes, I see where the text is.

Q: Could you please identify this document for the record?

A: To be honest, I can't remember who gave the original information, but it got built on by Dan Grosso, and also I believe Wes [Tomaszek] at some point reviewed and approved the final document. But as far as the original text—

Q: What is this?

A: This is the—I think this is the text that Dan and the group used to explain the project. I don't know if it went—they would have to tell you if it went into a formal capex of document approval, but it was around the time we were trying to describe the project for approval.

. . .

Q: What part of this memo did you prepare, the lighter text or the darker, bolder text?

A: Without seeing how this initiated, none of this stuff—in the beginning was just me walking around, Juan Manuel and Chuck telling me what we are doing, what we are doing, and typing it in. I mean I didn't even know what a MicroDuct line was at the time. So to be honest with you, this was a kind of dictation of other people telling us what to write to put the proposal together. . .

Q: What part of this document did you . . .

A: I'm going to assume that the money part is his, and then this bottom part was what our group, what I put together from Juan and Chuck.

(Tr. 524–526.)

Jenkins appeared to try to avoid testifying that Respondent sought to hire a consultant to assist in antiunion training, despite documentary evidence (GC Exh. 17) to the contrary:

Q: You were considering hiring Mr. Russell to assist Ms. Light in the Company's hiring [and] anti-union training, correct?

A: Chuck Parke is the one that requested we ask him for that.

Q: But that was the purpose, correct?

A: Well, I also think there was a lot of things. He did training, [to] help us ramp up. He had a lot of experience on his resume.

Q: But part of it was for your hiring [and] anti-union training, correct?

A: I believe that was the request. I can't remember exactly.

(Tr. 529–530.) Given her propensity to go beyond the questions asked of her, and her difficult demeanor on the witness stand, I did not credit the testimony of Jenkins when it was contradicted by other witnesses or evidence.

I did not find much of Sean Chapman's testimony credible. He gave contradictory testimony to the General Counsel:

Q: Did you fill out a new employment application to transfer to Clinton?

A: A transfer sheet, yes.

Q: No, a new employment application.

A: I don't recall.

Q: You don't recall?

A: No, ma'am.

Q: So you think you might have filled out an employment application, or you just don't know?

A: I did not fill out an application.

(Tr. 543.)

Chapman also had a vague recall of key events, which required that his memory be refreshed with his pretrial affidavit:

Q: What did [Wilhoit] say about your wages?

A: I don't recall much about your wages. . .

. . . [Chapman is shown his pretrial affidavit]

Q: Ms. Wilhoit also told you that you couldn't talk about it with any line bosses or anything, not your wages, nothing related to your Clinton position, correct?

A: Yes, ma'am.

Q: And not your wages either, correct?

A: Yes.

(Tr. 542.) Therefore, I credited the testimony of Chapman only where it was inherently plausible or uncontradicted.

I did not credit the testimony of Respondent's witnesses that Respondent was unaware of its employees' union activity. These denials fly in the face of the evidence establishing that everyone at Respondent's corporate headquarters knew of the presence of the Union in Middlesboro, of the limitation imposed by the Union on operating around-the-clock, and of impending union negotiations. Furthermore, Wilhoit placed information on grievances filed in Middlesboro onto a common drive available to those in Respondent's corporate headquarters. She also spoke to Fraley about grievances pending arbitration.

In contrast, I found the testimony of the witnesses presented by the General Counsel to be reliable. Initially, I found the testimony of Freddie Chumley to be credible. He testified in a methodical manner. His testimony regarding the damage to his grill and coffeemaker was corroborated by the photographs taken by Witt and his testimony regarding his missing tools was corroborated by Ballew. More importantly, his testimony was not rebutted, other than by the incredible testimony of Wasson. Therefore, I credit Chumley's testimony.

I further found the testimony of Bobby Philpot credible. He testified in a steady and sure fashion. His testimony regarding his conversation with J. Hatfield in which J. Hatfield stated that the Middlesboro facility was closing due to the Union's grievances was corroborated by Hatfield himself. Therefore, I have credited the testimony of Philpot.

I further found the brief testimony of Rick Ballew credible. Although his voice was quiet, his testimony had the ring of truth. He did not waver on cross examination. Therefore, I have credited his testimony.

I further credited the testimony of Phillip Smith. Smith did not waver on cross examination and his testimony was logical.

Although his testimony was somewhat contradicted by Calhoun, Calhoun admitted telling employees that the Union was partially to blame for the plant closure. Thus, I have credited Smith's testimony.

I have also credited the brief testimony of Dennis Lane, Matthew Craig, Elmer Evans, and David Witt. Respondent did not cross-examine Lane or Witt and their testimony stands unrebutted. With regard to Lane's testimony, Calhoun did not directly deny that the shutdown was partially caused by Union President R. Hatfield, instead generally denying that he told anyone that the Middlesboro closure was caused by the Union or its grievance filing. Witt's testimony was completely unrebutted. Respondent only cross-examined Craig regarding Wasson's position in its corporate hierarchy and cross-examined Evans regarding the timing of statements made by Roark and Wasson. As such, I have credited the testimony of Lane, Craig, Evans, and Witt.

I further credited the testimony of Robert Hatfield. He testified in a sincere fashion and did not waver on cross examination. He freely admitted that he filed grievances on behalf of numerous employees who were discharged for seemingly serious infractions of Respondent's rules. He further candidly admitted to posting some rather tasteless comments regarding Respondent on social media. (R. Exh. 2.) Following the closure announcement, R. Hatfield posted:

> U can't justify keeping 135+ people employed? This place has been here since 1971 and has been a cornerstone of the local economy for many years. I really hate to wish ill upon anyone, but may the fleas of ten thousand camels infest your underwear and I hope the whole outfit belly up by this time next year.

R. Hatfield further posted a picture depicting a tube of "Butthurt Cream," a picture of Vaseline labeled, "This definitely was not used today," and a picture of feces labeled, "DURALINE!" (R. Exh. 2.) Respondent argues that these postings demonstrate R. Hatfield's anger and willingness to lie. I disagree. Although the postings certainly show that R. Hatfield was angry after Respondent announced it was closing the Middlesboro facility, such anger is understandable. Furthermore, nothing in these posts evinces a desire to be untruthful. Instead, given R. Hatfield's sure demeanor on the witness stand and his plausible and corroborated testimony, I credit him.

I also credit the testimony of International Union Staff Representative Terry Sims. Sims testified in a calm and steady manner. More importantly, his testimony was not contradicted in any meaningful way by other witnesses or evidence.

I have credited the testimony of Respondent's witnesses Parke, Kovacs, and Tomaszek. I did not credit much of the testimony of Respondent's supervisors in Middlesboro or Chari, Hilliard, Jenkins, or Chapman. Furthermore, I have credited the testimony of the General Counsel's witnesses over those of Respondent's witnesses for the reasons set forth in this section and cited elsewhere in this decision.

B. Respondent Violated Section 8(a)(3) and (1) of the Act by Closing the Middlesboro Facility (Complaint Paragraph 6(c))

An employer violates Section 8(a)(3) and (1) of the Act by taking adverse action against employees because of their protected, concerted activities. The critical question in such cases is whether the employer's challenged action was motivated by the employees' protected, concerted activity, which the Board assesses by applying *Wright Line*.[30] Under *Wright Line*, the General Counsel bears the initial burden to show that the employees' protected activity was a motivating factor for the adverse action by demonstrating: (1) the employee's protected activity; (2) the respondent's knowledge of that activity; and (3) the respondent's animus. See *Austal USA, LLC,* 356 NLRB 363, 363 (2010). A discriminatory motive or animus may be established by circumstantial evidence, inferred from several factors, including the timing between the employees' protected activities and the adverse employment action, pretextual and shifting reasons given for the adverse action, statements showing the employer's general or specific animus, and other unfair labor practices. *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Temp Masters, Inc*., 344 NLRB 1188, 1193 (2005) (shifting or pretextual defenses); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Lucky Cab Co.,* 360 NLRB 271, 274 (2014) (contemporaneous 8(a)(1) violations). The burden then shifts to the respondent to show that it would have taken the same action, even in the absence of the employee's protected activity. *Austal USA, LLC,* 356 NLRB at 363–364. Under *Wright Line,* an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.,* 316 NLRB 771 (1995); *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996).

The record evidence compels my finding that Respondent indeed transferred work from Middlesboro to its other plants in retaliation for the employees' protected, concerted activity. Respondent was well-aware of its employees' union activities. Every piece of evidence presented at the trial regarding the closure of the Middlesboro facility or the transfer of its work also makes reference to the unionized work force in Middlesboro or the upcoming bargaining obligation there. For example, Chari mentioned the fact that Middlesboro's work force was unionized three times in his initial presentation to Mexichem. Respondent's other senior leaders mentioned the presence of the Union multiple times in correspondence accompanying the later capital expenditure requests to Mexichem. Many of Respondent's supervisors commented that grievance filing activity would result or did result in the closing of the Middlesboro facility. Furthermore, Respondent's highest ranking officials repeatedly cited upcoming union contract negotiations as a reason for closing (or accelerating the closure of) the Middlesboro facility.

The timing of the work transfer, just before negotiations for a successor agreement were to have commenced, supports my finding of an unlawful motivation for the transfer. See *Amglo Kemlite Laboratories,* 360 NLRB 319, 330 (2014), enfd. 833 F.3d 824 (7th Cir. 2016) (finding that suspicious timing of

[30] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

work transfer, just after employees engaged in a protected work stoppage, supported a finding of unlawful motivation); *Vico Products Co.,* 336 NLRB 583, 587 (2001) (decision to relocate unlawful when employer implemented layoffs and relocation within 3 months of union's certification as bargaining representative of employees). See also *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004) ("It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation.") By its managers' own words, Respondent sought to avoid an impending bargaining obligation by closing the Middlesboro facility.

Respondent's antiunion animus is demonstrated by its multiple and serious threats to employees in violation of Section 8(a)(1), which Respondent made both before and after it announced its plans to shutter the Middlesboro facility. Threats of reprisal to employees for engaging in union activity demonstrate antiunion animus. *El Paso Electric Co.,* 355 NLRB 428, 445–446 (2010), affd. 681 F.3d 651 (5th Cir. 2012). When an employer's representative announces an intent to retaliate against employees for engaging in protected activity, the Board has before it "especially persuasive evidence" that a subsequent adverse action was unlawfully motivated. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985), enfg. 271 NLRB 1320 (1984), cert. denied, 476 U.S. 1159 (1986).

Furthermore, Respondent's supervisors made frequent disparaging remarks about Local Union President R. Hatfield and multiple threats to employees, including, "this is the type of shit that's going to get you guys out of job and get the facility shut down," "if he . . . doesn't quit with all of these grievances . . . they're going to shut this place down," and "[R. Hatfield] and the Union . . . were the reason[s] that they shut the facility." Statements that union activity would result in job loss have supported a finding that a relocation of operations, allegedly for business reasons, has been found unlawful. *Taylor Machine Products,* 317 NLRB 1187, 1212–1214 (1995), enfd. in relevant part 136 F.3d 507, 515 (6th Cir. 1998). The threats and disparagement found herein provide ample evidence of Respondent's antiunion animus.

I reject Respondent's argument that the statements of Respondent's supervisors and agents at the Middlesboro facility cannot be imputed to those who made the decision to close the facility. Section 2(13) of the Act makes it clear that an employer is bound by the acts and statements of its supervisors whether specifically authorized or not. *Dorothy Shamrock Coal Co.,* 279 NLRB 1298, 1299 (1986). It is well established that the Board imputes a manager's or supervisor's knowledge of an employee's protected concerted activities to the decision-maker, unless the employer affirmatively establishes a basis for negating such imputation. *G4S Solutions (USA), Inc.,* 364 NLRB No. 92 slip op. at 4 (2016), citing *Vision of Elk River, Inc.,* 359 NLRB 69, 72 (2012), reaffirmed and incorporated by reference in 361 NLRB 1395 (2014). Respondent here has not put forth any evidence that knowledge should not be imputed to its decision-makers, other than discredited denials of its supervisors and high-ranking management officials. See *Aliante Casino & Hotel,* 364 NLRB No. 78 (2016), citing *State Plaza, Inc.*, 347 NLRB, supra at 756–757 (supervisor's knowledge of union activities is imputed to employer unless credited testimony establishes the contrary). Hilliard's equivocal testimony that Chari either never, or only sometimes, spoke about the Union at Middlesboro does not serve as a basis for refusing to impute knowledge. Everyone at Respondent's corporate headquarters knew of the presence of the Union in Middlesboro, of the limitation imposed by the Union on operating around-the-clock, and of impending union negotiations. Furthermore, Wilhoit placed information on grievances filed in Middlesboro onto a common drive available to those in Respondent's corporate headquarters. She also spoke to Fraley about grievances pending arbitration. For these reasons, I find that it is proper to impute knowledge of union activity in Middlesboro to those in Respondent's corporate headquarters.

Additionally, requiring union employees to go to a new facility to apply for a job has been found as evidence of animus. *Allied Mills, Inc.,* 218 NLRB 281, 288 (1975) enfd. mem. sub nom. *Grain Millers Local 110 v. NLRB*, 543 F.2d 417 (D.C. Cir. 1976), cert. denied 431 U.S. 937 (1977). In that case, decisions to close one plant and build another were made by top management, but antiunion remarks made by respondent's agents at meetings and threats made by its acting superintendent were used to assess the respondent's motivation. Id. The Board in that case further found that hurdles imposed upon employees from the closed plant to apply for jobs at the new plant, including a requirement that they go to the new plant to apply, reflected the respondent's desire to rid itself of the union. Id. Similarly, in the instant case, Respondent's supervisors and agents made numerous threats to employees and Respondent imposed serious hurdles on employees seeking work at its new plant. Respondent also considered hiring a consultant to assist in anti-union training at Clinton. Furthermore, unit employees were hired at Clinton, or in Georgia or Ohio. Therefore, I find that Respondent's requiring employees to go to the Clinton facility to apply for jobs provides additional evidence of its antiunion animus.

Respondent further sought to keep its transfer of work from Middlesboro a secret from the Union. Respondent actively sought to avoid telling the Union of its plans to close the Middlesboro facility and transfer its work elsewhere. An employer's stealth in carrying out relocation and its refusal to inform the union of the relocation or available positions, demonstrate a desire to rid itself of the union and avoid bargaining. *Vico Products Co.,* 336 NLRB 583, 589 (2001). The evidence establishes that Parke did not want the Union to find out about the Clinton facility. Hilliard did not want the Union to find out about the number of hires at Clinton and did not want Clinton to become an issue at the bargaining table. Parke also sought to hide the hiring of new employees in Clinton from the Union in an e-mail. In fact, Respondent was successful in its strategy as Clinton did not become an issue at the bargaining table. Respondent's strategy evinces its desire to rid itself of its only unionized work force.

Respondent's multiple and shifting reasons given for the closure of the Middlesboro facility and the transfer of its work elsewhere also support a finding of unlawful motivation. One of the reasons given by Chari in his presentation to Mexichem for the closure of the Middlesboro facility was its lack of a rail

spur. Respondent's capital expenditure request for the development of the Clinton facility indicated that a rail spur was needed. However, by the date of the hearing, the rail spur in Clinton was not completed. Chari incredulously testified that a rail spur was not necessary in Clinton. Therefore, I find the need for a rail spur as a reason for shuttering the Middlesboro facility was pretextual.

The General Counsel has established a prima facie case through evidence of employees' union activity, Respondent's knowledge of this union activity, and Respondent's animus toward its employees' union activity. The burden now shifts to Respondent to show that it would have taken the same action even in the absence of the employee's protected activity. I find that Respondent has not carried this burden.

The General Counsel has established that Respondent bore strong animus to its employees' union activities—both by seeking to avoid contract negotiations with its employees and by numerous threats made by Respondent's supervisors and managers in Middlesboro. Where the General Counsel makes out a strong showing of discriminatory motivation, Respondent's rebuttal burden is substantial. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). The economic data in the record does not justify Respondent's accelerated closure of the Middlesboro facility, particularly where that precise form of retaliation, plant closure, was unambiguously threatened shortly before and after it was carried out. See 301 NLRB at 890. Much more is needed to show that the plant closure was for nondiscriminatory reasons. Id.

Although the Respondent's financial forecasts supply a legitimate reason for closing the Middlesboro facility, none of the credited evidence demonstrates that Respondent would have closed the facility absent employees' protected conduct. Middlesboro was Respondent's most profitable and productive facility. Respondent embedded references to the unionized status of its work force and upcoming collective-bargaining negotiations throughout its economic justifications for closing the Middlesboro facility and transferring its work to its nonunion facilities. Furthermore, the record is replete with threats by Respondent's supervisors and agents that employees' union activities would result in plant closure or had caused the plant closure. An employer does not satisfy its burden under *Wright Line* merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.,* 316 NLRB 771 (1995); *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996). See also *Royal Norton Mfg. Co.,* 189 NLRB 489, 492 (1971) (Board agreed with the trial examiner's finding that regardless of the employer's economic justification for terminating its operations at one plant and relocating elsewhere, the decision to move was unlawful and motivated by Respondent's desire to avoid its bargaining obligations under the Act). Here, the requests to close and later accelerate the closure of Middlesboro are completely enmeshed with Respondent's stated desire to avoid its bargaining obligation and with mentions of the unionized work force there. In every piece of correspondence and in the initial capital expenditure request, Respondent links the presence of the Union, limitations imposed by the Union, and its desire to avoid bargaining with the Union with the closure of the Middlesboro facility. Therefore, I cannot find that Respondent has carried its rebuttal burden.

C. Respondent did not Violate the Act by Refusing to Bargain Over the Middlesboro Closure, Layoffs, and Transfer of Equipment and Work (Complaint Paragraph 9(a) and (b))

Paragraph 9(a) and (b) of the complaint allege that Respondent failed and refused to bargain collectively with the Union regarding its decision to lay off unit employees, relocate its equipment and work, and close the Middlesboro facility.

Respondent's most recent collective-bargaining agreement with the Union was effective April 18, 2013, though April 18, 2016. This agreement contained the following provision:

> ARTICLE IV. Management's Rights Clause.
>
> Except to the extent expressly abridged by a specific provision of this Agreement, the Employer reserves and retains solely and exclusively all of its inherent rights to manage the business.
>
> Without limiting the generality of the foregoing, the sole and exclusive rights of management which are not abridged by this [a]greement include, but are in no way confined to, the right to establish reasonable rules and regulations governing the conduct of employees; the right to terminate employees in accordance with the terms of this [a]greement; **the right to determine and from time to time redetermine the number, location and types of its plants and operations; the right to close, lease, or sell such plants or operations**; and the right to determine the methods, processes, and materials to be employed; the right to discontinue processes or operations, or to temporarily or permanently limit or curtail any part of or all of such processes or operations; to subcontract work; to determine the number of hours per day or per week operations should be carried on; and to determine the numbers of shifts and hours of shifts and the right to select and determine the number and types of employees required and assign work to such employees.

(Emphasis added.) (R. Exh. 1.)

Based upon this language, I find that Respondent was relieved of its duty to bargain over the decision to transfer the work of the Middlesboro facility to three other facilities.[31] The Supreme Court has long held that the Act disfavors waivers of statutorily protected rights and will find such a waiver only when it has been made in a "clear and unmistakable" manner. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The clear and unmistakable waiver standard requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. *Provena St. Joseph Medical Center,* 350 NLRB 808, 811 (2007). The standard reflects the Board's policy, grounded in the Act, in favor of

[31] Despite Respondent asserting the waiver issue in its answer, the General Counsel and Union did not address this issue in their briefs.

collective bargaining concerning changes in working conditions that might precipitate labor disputes. Id.

In *Owens-Brockway Plastic Products,* 311 NLRB 519, 525 (1993), the Board stated that the critical question is not whether such a right might reasonably be inferred from the management rights clause; it is whether that interpretation is supported by clear and unmistakable language. In that case, the employer contended that the management rights provision of the parties' collective-bargaining agreement permitted it to unilaterally to close a plant and to relocate the work performed there. (311 NLRB at 525.) The management rights clause there permitted the employer to, inter alia, ". . . increase or decrease operation, the types of products made, methods, processes, and means of production, use and control of plant property, . . . remove or install machinery and increase or change production equipment, introduce new and improved productive methods and facilities . . ." Id. The Board found that the language in that management rights clause, granting the employer unilateral authority with respect to increasing or decreasing operations, but without any reference to work relocation, did not meet the clear and unmistakable standard governing the waiver of statutory rights. Id. citing *Johnson-Bateman Co*., 295 NLRB 180, 184–185 (1989). Management rights clauses, which are couched in general terms and make no reference to the particular subject will not likely be considered as waivers of statutory bargaining rights. *Johnson-Bateman Co*., 295 NLRB 180, 185 (1989), *AK Steel Corp*., 324 NLRB 173 (1997).

The management rights clause in this case is far more explicit than the one in *Owens-Brockway Plastic Products,* and references the very activity that Respondent engaged in: the closing of the Middlesboro facility. The management rights clause here specifically grants Respondent the right to, "determine and from time to time redetermine the number, location and types of its plants and operations; the right to close, lease, or sell such plants or operations."

The management rights clause at issue contains several provisions, which go beyond a mere general proviso, in at least two respects. First, the management rights clause specifically granted Respondent "the sole and exclusive right" to close its plants. By agreeing to the combination of provisions allowing Respondent to determine the number of its plants, close its plants, and determine the number of employees it required, the Union relinquished its right to demand bargaining over these subjects. Second, the management rights clause grants Respondent the authority to determine or redetermine the number and location of its plants. This is exactly what Respondent did in this instance. Respondent determined that other locations would be more beneficial to it than the Middlesboro location. Therefore, I find that the Union waived its right to bargain over the closure, and attendant layoffs and work transfer, and I accordingly recommend the dismissal of this allegation in the complaint. *United Technologies Corp*., 287 NLRB 198 (1987), enfd. 884 F.2d 1569 (2nd Cir. 1989). See *Dorsey Trailers, Inc*., 327 NLRB 835 (1999).

Indeed, the Board has found a clear and unmistakable waiver in similar situations. For example, the Board found that a union waived its right to bargain over a plant closure when a management rights clause contained the following language, "to determine whether and to what extent the work required in its business shall be performed by employees covered by this Agreement." *American Stores Packing Co.*, 277 NLRB 1656, 1658 (1986). In another, more recent, case the Board found a clear and unmistakable waiver of a union's right to bargain over subcontracting of unit work, despite the fact that the management rights clause did not contain the word "subcontract." *Chemical Solvents, Inc.,* 362 NLRB No. 164, slip op. at 7 (2015). In that case, the Board stated that the right to outsource work to another entity was appropriately classified as subcontracting. Id. The Board went on to state that subcontracting could not occur without the transfer of work to another entity. Id. at 8. The management rights clause in this case is even more specific than these examples.

I find this case distinguishable from *Reece Corp.,* 294 NLRB 448 (1989). In that case, the Board found no clear and unmistakable waiver when the management rights clause referred to the right to "abandon or discontinue any production, methods or facilities" a separate contract provision referred to a decision to "close permanently the plant or discontinue permanently a department of the plant or portion thereof and terminate the employment of individuals." 294 NLRB at 450. In this case, the management rights clause explicitly grants Respondent the right to close any of its facilities and to determine or redetermine the number and location of its plants without reference to another provision of the parties' collective-bargaining agreement; both provisions are contained in the management rights clause. Therefore, I find this case factually distinguishable from *Reese Corp.*

In summary, I cannot find that Respondent's actions violated Section 8(a)(5) and (1) of the Act based upon the clear and unmistakable waiver of the Union's right to bargain over the closure of the Middlesboro facility. Therefore, I recommend that the Board dismiss the allegations regarding Respondent's refusal to bargain over its decision to lay off unit employees, relocate its equipment and work, and close the Middlesboro facility.

D. Respondent Violated Section 8(a)(5) and (1) of the Act by Changing the Amount of its 2015 Thanksgiving Bonus to Unit Employees (Complaint Paragraph 9(c))

Prior to 2015, all employees, including bargaining unit members, were given a $25 gift card to a local food store. It is not disputed that Respondent distributed $16.00 gift cards to a local food store to bargaining unit members in 2015. There is further no dispute that the parties' collective-bargaining agreement states that employees shall receive a $16 gift card. However, the credited evidence establishes that for at least the past several years, Respondent has elected to provide its employees gift cards in the amount of $25.[32]

It is well established that a bonus or gift consistently bestowed for a period of time is considered a component of wages or a term or condition of employment. *Simpson Lee Paper Co.,* 186 NLRB 781, 783 (1970). The Board approved the analysis

[32] Wilhoit alone testified that the $25 gift cards had been given for only the past 2–3 years. However, I did not credit Wilhoit's testimony for the reasons stated in the credibility determination section, of this decision.

of the administrative law judge in *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353 (2003):

> A past practice is defined as an activity that has been "satisfactorily established" by practice or custom; an "established practice"; an "established condition of employment;" a "longstanding practice" (citations omitted). *Exxon Shipping Co*., 291 NLRB 489, 493 (1988); See, also, *Golden State Warriors,* 334 NLRB 651 (2001), *Dow Jones & Co., Inc*., 318 NLRB 574, 578 (1995). Thus, an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue. *Sykel Enterprises*, 324 NLRB 1123 (1997); *Blue Circle Cement Co*., 319 NLRB 661 (1995); *Lamonts Apparel, Inc*., 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel*, 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida*, 144 NLRB 311 (1963); *The American Lubricants Co*., 136 NLRB 946 (1962).

Here Respondent gave its employees a $25 gift card for Thanksgiving for several years preceding 2015. For reasons not satisfactorily explained by Wilhoit, it did not do so in 2015. Respondent was obligated to first notify and then bargain with the Union before ending its past practice of awarding $25 gift cards. Respondent failed to do so here and, as such, violated Section 8(a)(5) and (1) of the Act.

E. Supervisory or Agency Status of Calhoun and West

As stated above, Respondent denies that Calhoun and West are supervisors of Respondent within the meaning of Section 2(11) of the Act or agents of Respondent within the meaning of Section 2(13) of the Act. Based upon the evidence presented at trial, I find that the General Counsel has established that Calhoun is a supervisor and agent and that West is an agent of Respondent within the meaning of the Act.

Section 2(11) of the Act provides that a supervisor is one who possesses, "authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.,* 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001)). It is well-settled that the party asserting supervisory status bears the burden of proof on the issue by a preponderance of the evidence. *Oakwood Healthcare, Inc.,* 348 NLRB at 694 (citing *Kentucky River Community Care,* 532 U.S. 711–712 (2001)).

West estimated that while employed as Respondent's scheduler, he spent 95 percent of his time as scheduler and 5 percent as a foreman. He testified that he served as a supervisor once every few weeks or less. When serving as a substitute foreman, West was able to discipline employees, and the General Counsel produced evidence of West doing so on 4 occasions over a 4-year period. (GC Exh. 3, 4, 8, 9.) The sporadic issuance of discipline, while a regular supervisor is on vacation, does not confer supervisory status under the Act. *The Republican Co.,* 361 NLRB 93, 103 (2016). See also *Marion Rohr Corp.,* 261 NLRB 971, 972 (1982) ("it is well established that an employee whose substitution for a supervisor is sporadic and limited cannot be deemed a statutory supervisor.") Thus, I find that West's sporadic substitution as a supervisor does not make him a supervisor of Respondent for the purposes of Section 2(11) of the Act.[33]

As for Calhoun, I find that the General Counsel has established that he is a supervisor of Respondent as defined in Section 2(11) of the Act. As Respondent's quality manager, Calhoun supervised 5 quality technicians, who were not part of the bargaining unit. He had the authority to hire, fire, and discipline these technicians. He further ensured that procedures were followed and paperwork was properly completed. According to Smith, a unit member, when he was assigned to work in the quality department, he received his tasks from Calhoun. Smith further testified that employees could not refuse assignments from Calhoun.

Calhoun regularly performed supervisory duties with regard to 5 employees, albeit nonunit employees. The Board has found individuals exercising supervisory authority over nonunit personnel to be supervisors within the meaning of Section 2(11) of the Act. *Detroit College of Business,* 296 NLRB 318, 321 (1989). In *Detroit College of Business,* the Board found that coordinators who spent about 25 percent of their time hiring and evaluating nonunit personnel were supervisors within the meaning of the Act. 296 NLRB at 321. The Board noted that these supervisory duties constituted regular and frequent portions of the coordinators' responsibilities, making them so allied with management as to establish a differentiation between them and other employees in the unit. Id. Similarly, in the instant case, Calhoun regularly exercised supervisory authority over 5 quality technicians and part of his function was to hire, fire, and discipline the technicians. In fact, he testified that his primary responsibility was to oversee the 5 quality technicians. As such, I find that Calhoun is a supervisor of Respondent as defined in Section 2(11) of the Act.

The record establishes that both Calhoun and West are agents of Respondent within the meaning of Section 2(13) of the Act. As with claims of supervisory status, the burden of establishing that an individual is an agent rests with the party asserting it. *Oakwood Healthcare, Inc.,* 348 NLRB at 687. The party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct alleged to be unlawful. *Pan-Oston Co.,* 336 NLRB 305 (2001).

The Board applies common-law principles of agency in de-

[33] Although there was testimony at the trial that West could assign overtime or ask employees to stay late, there was no evidence as to how frequently he did so.

termining whether an employee is acting with apparent authority on behalf of an employer when that employee makes a particular statement or takes a particular action. *Pan-Oston Co.,* supra, citing *Cooper Industries,* 328 NLRB 145 (1999). Agency status can be established when an employee is held out as a conduit for transmitting information to employees. *D&F Industries,* 339 NLRB 618, 619 (2003); *Hausner Hard-Chrome of KY, Inc.,* 326 NLRB 426, 428 (1998).

As the scheduler, West scheduled what the lines would run on the floor. He further disciplined unit employees, albeit infrequently, as outlined above. Philpot testified without contradiction that Calhoun assigned work to unit personnel and that these employees could not refuse his assignments. As such, I find that both Calhoun and West would be the sort of employees who acted as a conduit transmitting information from management to other employees. Therefore, I find that both Calhoun and West are agents of Respondent within the meaning of Section 2(13) of the Act.

F. Respondent Violated Section 8(a)(1) of the Act through Multiple Threats Made to Unit Employees (Complaint Paragraph 5)

The Board has long held that an employer violates Section 8(a)(1) of the Act when it engages in conduct that might reasonably tend to interfere with the free exercise of employee rights under Section 7. *Greenbriar Rail Services,* 364 NLRB No. 30, slip op. at 35 (2016), citing *American Freightways Co.,* 124 NLRB 146 (1959). The test of interference, restraint, and coercion under Section 8(a)(1) does not turn on the employer's motive or on whether the coercion succeeded or failed. *Greenbriar Rail Services,* at 35, citing *American Tissue Corp.,* 336 NLRB 435, 441 (2001).

A threat to close a plant should union activity continue violates Section 8(a)(1). *Triana Industries, Inc.,* 245 NLRB 1258, 1262 (1979). A statement by a manager that he would close the plant before he would have a union telling him what to do has been found violative of Section 8(a)(1) of the Act. *Triana Industries, Inc.,* 245 NLRB at 1262. Furthermore, threatening to close a plant rather than reinstate discharged employees, whose discharges were the subject of a grievance, has been found to violate the Act. *D&B Commercial Body Sales, Inc.,* 223 NLRB 1048, 1048 (1976). A similar threat, associating plant closure with grievance activity, has been found to violate the Act. *Ohio Ferro-Alloys Corp.,* 209 NLRB 577, 580 (1974) (Manager's statement that, "It's people like [union officials] . . . that is going to close this plant down" violated the Act.)

A statement by a supervisor or agent of an employer threatening plant closure violates the Act, even if the speaker attempts to couch the statement as his personal opinion. *Twistex, Inc.,* 283 NLRB 660, 663 (1987). A threat stated as a matter of personal opinion is still coercive. *Mid-South Drywall Co., Inc.,* 339 NLRB 480, 481 (2003), citing *Clinton Electronics Corp*., 332 NLRB 479 (2000) (finding a threat of job loss threat couched as personal opinion violated Section 8(a)(1).) Moreover, threats allegedly made in a joking manner also violate the Act. *Southwire Co.,* 282 NLRB 916, 918 (1987), citing *Champion Road Machinery*, 264 NLRB 927, 932 (1982) (Applying an objective standard, the Board found a supervisor's statement violated Sec. 8(a)(1) of the Act, although the threatened employee testified he felt certain the comment was a joke).

Respondent argues that certain of the alleged threats do not violate Section 8(a)(1) of the Act because they were made after the decision to close the Middlesboro facility had already been made. I reject this argument. Even if the decision to close the facility had been made, the message conveyed repeatedly to the employees was abundantly clear: that the Union and its grievance filing activity would cause or had caused the closure. Whether these statements were true or not is of no moment. "In determining if such statements constitute interference, restraint, or coercion, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or on the success or failure of such coercion." *Dorsey Trailers, Inc.,* 327 NLRB 835, 851 (1999), enfd in pertinent part 233 F.3d 831, 838–839 (2000), citing *Joy Recovery Technology Corp*., 320 NLRB 356, 365 (1995) and *Miami Systems Corp*., 320 NLRB 71 fn. 4 (1995). I find that the threats alleged by the General Counsel in the complaint would reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act.

1. Patsy Wilhoit (Complaint Paragraph 5(a))

The General Counsel alleges that in June 2015, Wilhoit threatened employees by telling them that filing grievances would cause Respondent to shut the doors of its Middlesboro facility.

In June 2015, a cousin of local union president Robert Hatfield died. R. Hatfield's supervisor told him that he would be disciplined or suspended for missing work because his excuse was not accepted. R. Hatfield went to see Wilhoit. When R. Hatfield pointed out the policy in the parties' contract, which allows for 1 day off in the event of the death of a relative not specifically listed in the policy, to Wilhoit, she said, "This is the type of shit that's going to get you guys out of job and get the facility shut down." For the reasons stated elsewhere in this decision, I have credited the testimony of R. Hatfield over that of Wilhoit. In addition, Wilhoit evinced a sharp dislike of R. Hatfield. In light of R. Hatfield's credited testimony, I find that Wilhoit told him that his activity in enforcing the contract would result in plant closure. As such, I find that Wilhoit's statement to R. Hatfield constituted a threat in violation of Section 8(a)(1) of the Act.

2. Mike Roark (Complaint Paragraph 5(b) and (g))

The General Counsel alleges that in August 2015, Roark threatened Local Union President Robert Hatfield by telling him that he would need bodyguards to get to and from work if he continued to file grievances. The General Counsel further alleges that in September 2015, Roark threatened employees by telling them that if the Union continued to file grievances, there would no longer be a union because the facility would be closed and the union employees would be out of a job.

In August 2015, R. Hatfield filed a grievance with Roark on behalf of another employee being forced to perform work contractually required of other employees. Roark responded that, "[R. Hatfield] was going to have to have bodyguards to escort [him] to and from work." R. Hatfield asked Roark what he

meant by this. Roark replied that if he wanted to get rid of him [Hatfield], there was nothing that anyone, including the union and the labor board, could do about it. Roark admitted that he stated, " . . . you're going to need a bodyguard from your house to over here." Despite Roark's efforts to couch this statement as a joke, I find it nevertheless constituted a threat. This statement clearly links a threat of bodily harm with grievance filing activity. As such, Roark's statement to R. Hatfield constituted a threat violative of Section 8(a)(1) of the Act.

Later, in September 2015, R. Hatfield filed a grievance with Roark on behalf of an employee terminated for attendance issues. Roark stated that those grievances were the types of things that were going to get the doors closed on the facility cause everyone to be out of a job. Roark did not specifically testify about this conversation. In this instance, I have credited the testimony of R. Hatfield. I found R. Hatfield to be a more credible witness than Roark. Furthermore, Roark did not specifically rebut R. Hatfield's testimony regarding this conversation, instead stating generally that he did not tell employees that the Union or its grievance filing would result in the closure of the plant. As such, I find that Roark made the statement as testified to by R. Hatfield. This statement constitutes a threat of plant closure in retaliation for grievance filing activity, in violation of Section 8(a)(1) of the Act.

3. Bruce Wasson (Complaint Paragraph 5(c) and (i))

The General Counsel alleges that in August 2015, Wasson threatened employees by stating that they had received their wish, in that the Union had driven Respondent to move the plant. The General Counsel further alleges that in about August 2015, Wasson threatened employees by stating that Respondent wanted to get rid of the Union because Respondent wanted to do whatever it wanted to do. Wasson further allegedly threatened employees by stating that there were too many grievances and that a principal reason that Respondent was closing the Middlesboro facility was because the Union succeeded in getting two discharged employees reinstated.

In September 2015, after a disciplinary meeting regarding two employees, Wasson followed R. Hatfield outside to the parking lot and said, "You guys are going to get what you want, they're going to shut the doors, and you guys are going to be out of a job." This encounter occurred before the shutdown of the Middlesboro facility was announced to Respondent's unit employees. On September 29, shortly after the meeting at which the closing of the Middlesboro facility was announced, Wasson stated that one of the main reasons that Respondent was closing the facility was because the company can't run the facility the way they want to run it. Wasson added that the reinstatement with backpay of two employees, as well as a big pile of grievances from the Union, were among the main reasons for the shutdown.

Wasson testified that no one from Respondent's corporate headquarters ever told him that the Union or its grievance filing caused the closure of the Middlesboro facility. He further denied ever telling employees at Middlesboro that the Union or its grievance filing caused the closure of the Middlesboro facility.

I have found both Craig and R. Hatfield to be more credible witnesses than Wasson. As such, I find that Wasson's statements to R. Hatfield and Craig constituted threats of plant closure in retaliation for union and grievance processing activity. As such, Wasson's statements to R. Hatfield and Craig were threats violative of Section 8(a)(1) of the Act.

4. David Jackson (Complaint Paragraph 5(d))

The General Counsel alleges that in September 2015, Jackson threatened employees by stating that the Union was the reason Respondent was shutting its doors. During a conversation in Respondent's parking lot, Jackson admitted that he told other employees that R. Hatfield and the Union caused the shutdown. Jackson also stated that Hatfield couldn't take a joke and was being a big baby. Jackson, an admitted supervisor and agent of Respondent, did not testify at the hearing.

R. Hatfield's testimony on this point stands uncontradicted and I found him to be a credible witness. Therefore, I find that Jackson told R. Hatfield that he and the Union caused the shutdown of the Middlesboro facility. This statement constitutes a threat of plant closure in retaliation for union activity and, as such, it violated Section 8(a)(1) of the Act.

5. Jeff Hatfield (Complaint Paragraph 5(e))

The General Counsel alleges that in September 2015, J. Hatfield threatened employees by stating that if the union president did not stop filing grievances, Respondent would shut its doors. A few days after Respondent announced the closing of the Middlesboro facility, Philpot asked J. Hatfield why Respondent was closing the plant. J. Hatfield replied, "basically because [of] all the grievances." Hatfield testified that he never told anyone that the plant's closing was related to the Union.

In this instance I have credited the testimony of Philpot over that of J. Hatfield. I found Philpot to be a more credible witness for the reasons set forth above. In addition, J. Hatfield's general denial that he never told anyone that the plant's closing was related to the Union is not a specific denial that he told Philpot that the plant was closing because of grievances. As such, I find that J. Hatfield made the statement attributed to him by Philpot and find that his statement was a threat of plant closure in retaliation for grievance filing activity, in violation of Section 8(a)(1) of the Act.

6. Clifton West (Complaint Paragraph 5(f))

The General Counsel alleges that in September 2015, West threatened employees by telling them that they could thank the union president, the Union, and its grievances for getting the Middlesboro facility shut down. Shortly after the closing of the Middlesboro facility was announced, Philpot had a conversation with West at which employee Paul Green was present. West was upset and stated, "I told Robert [Hatfield] if he . . . doesn't quit with all of these grievances . . . they're going to shut this place down." West denied having a conversation with Paul Green about the plant closure and denied stating that the closure was because of Hatfield filing grievances.

In this instance I credit the testimony of Philpot over that of West. I found Philpot to be a more credible witness than West. In addition, West only denied having a conversation with Green, not Philpot. West generally denied stating that the plant closure was because of grievance filing activity. As such, I find that West made the statement attributed to him by Philpot and

that his statement constituted a threat of plant closure in retaliation for grievance filing activity, in violation of Section 8(a)(1) of the Act.

7. William Calhoun (Complaint Paragraph 5(j))

The General Counsel alleges that in November 2015, Calhoun threatened employees by stating that Respondent was shutting down because the union president files grievances all the time.

Employee Phillip Smith witnessed another employee ask Calhoun why Respondent was shutting the plant down. Calhoun replied that the main reason was because of the Union and the grievances it filed. Calhoun also mentioned that Middlesboro was Respondent's only unionized plant and that R. Hatfield filed all kinds of grievances and he and Wilhoit were not "meshing."

Employee Dennis Lane also testified about this conversation. According to Lane, Calhoun stated that the reason for the shutdown was 50 percent Patsy [Wilhoit] and 50 percent Robert [Hatfield]. Lane testified that he responded, "it's 75 Patsy and 35 Robert." Lane testified that Calhoun then shrugged his shoulders and walked off. Lane testified that another employee and Smith were also present for this conversation.

Although these versions of events are not identical, I do not find the differences material. Both employees testified that Calhoun linked the Union and R. Hatfield to the closing of the Middlesboro facility. Calhoun did not testify regarding this specific conversation. However, he admitted telling employees that dealing with the Union caused the shutdown. Calhoun testified that this reason was his personal opinion and that no one from Respondent's corporate headquarters ever mentioned the Union as a reason for a shutdown.

Calhoun admitted that he made statements to employees that the Union was to blame for the plant closure. Calhoun cannot negate the threatening nature of his statement by couching it in terms of his personal opinion. As such, I find that Calhoun made statements to employees that the shutdown of the Middlesboro facility was caused by the Union and grievances filed by its president. I further find that his statements were threats of plant closure in retaliation for union activity, in violation of Section 8(a)(1) of the Act.

G. Respondent Violated the Act by Destroying the Personal Property of an Employee (Complaint Paragraph 7)

The General Counsel alleges that on December 2, Respondent, through Bruce Wasson, threw away the personal property of Freddie Chumley because he gave testimony to the Board and cooperated in a Board investigation in violation of Section 8(a)(4) and (1) of the Act.

Section 8(a)(4) of the Act makes it unlawful for an employer to discriminate against an employee because he has filed charges or given testimony under the Act. 29 U.S.C. § 158(a)(4). The Board analyzes such allegations under the framework established in *Wright Line*.[34] *Newcor Bay City Division*, 351 NLRB 1034, 1034 fn. 4 (2007). Under this framework, it was the General Counsel's burden to establish discriminatory motivation by proving the existence of protected activity, the Respondent's knowledge of that activity, and the Respondent's animus against that activity. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004), citing *Wright Line*, supra at 1089. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Allied Mechanical II*, 349 NLRB 1327, 1328 (2007).

I find that the General Counsel has established that Freddie Chumley engaged in protected activity by assisting the Board in its investigation. Chumley gave an affidavit to the Board. I further find that Respondent, and Wasson, had knowledge of this activity. Wasson gave an affidavit to a Board agent on December 1. While giving his affidavit, the Board agent questioned Wasson about a conversation he had with Chumley regarding a union representative getting another facility closed down in Middlesboro. Thus, I find that Wasson knew that Chumley had cooperated with the Board in its investigation on December 1.[35]

I find the timing of Wasson's actions toward Chumley's property highly suspicious. He threw away Chumley's items only 1 day after giving testimony to a Board agent, during which he learned that Chumley had cooperated with the Board. Chumley testified that the items were in good working order on December 1. See *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004) ("It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation.") Thus, within 24 hours of learning of Chumley's cooperation with the Board, Wasson discarded Chumley's personal effects.

I find that the General Counsel has established that Wasson bore animus toward Chumley's activities in assisting the Board by throwing away his personal property. Wasson admitted throwing away Chumley's grill and coffee maker. Chris Ramsey told Rick Ballew that Wasson gave him Chumley's toolbox. The items found in the dumpster were heavily damaged, even though they were not broken the day before.

I further find that Respondent has not satisfied its rebuttal burden in this case. Respondent has not established that Chumley's property would have been discarded absent his cooperation with the Board. Although Wasson testified that some of the items were already damaged, this testimony was contradicted by Chumley and Witt. Furthermore, Respondent could not cite a reason why Wasson did not contact Chumley to pick up his items before disposing of them. As such, I find that Respondent has not sustained its rebuttal burden and instead find that the destruction of Chumley's property was caused by Wasson in retaliation for Chumley's cooperation with the Board. Given the numerous threatening statements made by Wasson, and the timing of the destruction of Chumley's property, I find

[34] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[35] I did not credit Wasson's testimony that he was never told that a union representative got another facility in Middlesboro or Corbin closed and instead credit Chumley's testimony. I further do not credit Wasson's testimony about why he disposed of Chumley's items and that they were already broken when he disposed of them as highly improbable. His testimony on this topic was rife with contradiction. MORE??

that Respondent violated Section 8(a)(4) and (1) of the Act when Wasson destroyed the property of Freddie Chumley.

H. Respondent Violated the Act by Telling Employees that They Could Not Discuss Their Terms and Conditions of Employment and by Requiring Employees to Sign Confidentiality Agreements (Complaint Paragraphs 5(h) and 6(a))

The General Counsel alleges that on about September 21, Patsy Wilhoit threatened employees that they could not speak with other employees about their terms and conditions of employment or anything related to Respondent's new Clinton, Tennessee facility. The General Counsel further alleges that on about September 15, Respondent required employees to sign a confidentiality/nondisclosure agreement as a condition of accepting employment at the Clinton, Tennessee facility.

The General Counsel bears the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Rocky Mountain Eye Center,* 363 NLRB No. 34 (2015), citing *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999).

Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if a rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. The relevant inquiry regarding the first showing under Section 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981). The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage Village Livonia*, supra at 647; *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007).

By signing the confidentiality agreement at issue in this case, Chapman agreed that he would not reveal any confidential information to third parties. (GC Exh. 1(dd), att. A.) The confidentiality agreement specifically defined "confidential information" as:

> business plans (including particularly, but not limited to, Dura-Line's plans for locating a facility in Clinton, Tennessee and its plans related to how other plants and locations may be impacted by the opening of the new facility), financial information regarding the business (including pricing, performance, revenue, sales projections, and other similar financial information regarding the status, performance and plans of Dura-Line), sales and marketing plans and projections, and software code or practices. . . "Confidential Information" does not include information that is available via public sources, or that has been legitimately released into the public arena.

Wilhoit further advised Chapman at the time he signed the agreement not to talk about the Middlesboro plant shutting down, his position in Clinton, or his wages.

I find that the confidentiality agreement did not explicitly restrict Section 7 rights. The rule does not mention that employees may not discuss wages or other terms and conditions of employment. Instead, the rule forbids discussing Respondent's plans for its Clinton, Tennessee facility, the fate of other plants, and financial information.

However, I find that the confidentiality agreement violates the Act in that employees would reasonably construe its language to prohibit Section 7 activity and because the rule was promulgated in response to union activity.[36] Initially, I note that the confidentiality agreement is vague in that it includes certain specific information, but goes on to state that it is not limited to that information. This leaves employees to guess what information, other than that listed, is confidential. See *T-Mobile USA, Inc.,* 363 NLRB No. 171 (2016). Moreover, employees could interpret this ambiguity as a prohibition against disclosing or discussing wages and salary, which could be included as financial information. As such, I find that a reasonable employee could construe the confidentiality agreement as prohibiting Section 7 activity and that it therefore violates Section 8(a)(1) of the Act.

Chapman testified that Wilhoit advised him not to talk about the Middlesboro plant shutting down, his position in Clinton, or his wages. Wilhoit did not testify about this conversation. As I have credited Chapman's testimony, I find that Wilhoit did, indeed, tell Chapman that he could not discuss his wages or the Clinton facility with anyone. It is axiomatic that discussing terms and conditions of employment with coworkers lies at the very heart of protected Section 7 activity. *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 205 (2007). The Board has long found that it is unlawful for employers to prohibit employees from discussing wages among themselves. *Waco, Inc.,* 273 NLRB 746, 747–748 (1984). Therefore, I find that Respondent, though Wilhoit, violated Section 8(a)(1) of the Act when Wilhoit told Chapman that he could not talk about his wages or the Clinton facility.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and International Union have been labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening employees with plant closure for grievance filing activity on numerous occasions, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By threatening employees that they would need body guards if they continued their grievance filing activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

5. By threatening employees by stating that their union ac-

[36] I have already found that the closure of the Middlesboro facility and the transfer of its work was motivated by the union activity of Respondent's employees.

tivity had caused or would cause the plant to close, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

6. By threatening employees by stating that they could thank the local union president, the union, and the union's grievances for the closing of the plant, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

7. By threatening employees that they could not speak with other employees regarding their terms and conditions of employment or anything related to its Clinton, Tennessee facility, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

8. By threatening employees by stating that Respondent wanted to get rid of the Union because it wanted to do whatever it wanted to do, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

9. By threatening employees by stating that Respondent closed the Middlesboro facility because the Union had succeeded in getting two discharged employees reinstated Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

10. By requiring employees to sign a confidentiality agreement in order to discourage its employees from engaging in union or other protected, concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

11. By closing and relocating the work from its Middlesboro, Kentucky facility to its facilities in Tennessee, Georgia, and Ohio because employees engaged in union activities and to discourage employees from engaging in these activities, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

12. By destroying the personal property of employee Freddie Chumley, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(4) and (1) and Section 2(6) and (7) of the Act.

13. By reducing the amount of the 2015 Thanksgiving bonus to employees from $25 per employee to $16 per employee without prior notice to the Union and without affording the Union an opportunity to bargain over this change, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

14. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, as I have found that Respondent has violated the Act by threatening employees with discharge and plant closure on multiple occasions, I shall order it to cease and desist therefrom. Moreover, having found that Respondent unlawfully destroyed he personal property of Freddie Chumley, I shall order it to reimburse him for his grill, coffeemaker, tools, and other personal effects.

As I have also found that Respondent unlawfully reduced the amount of its 2015 Thanksgiving bonus to its bargaining unit employees without first giving the Union notice and an opportunity to bargain, Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unlawful reduction of the 2015 Thanksgiving bonus. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Further, having found that Respondent unlawfully closed and transferred work from its Middleboro, Kentucky facility to facilities in Ohio, Georgia, and Tennessee in retaliation for its employees' union activities in violation of Section 8(a)(3) and (1) of the Act, I shall order Respondent to restore the transferred production work to its Middlesboro facility. I shall also order Respondent to offer full reinstatement to any employee who lost his or her job as a result of the unlawful plant closure and transfer of work or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights and privileges previously enjoyed, and to make whole each employee for any loss of wages and other benefits they may have suffered as a result of Respondent's unlawful transfer of work, in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall further compensate all affected employees for any adverse tax consequences of receiving a lump-sum backpay award. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), Respondent shall compensate the employees unlawfully laid off as a result of the closure and transfer of work from the Middlesboro facility for search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file a report allocating backpay with the Regional Director for Region 9. Respondents will be required to allocate backpay to the appropriate calendar years only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016). Respondent is also ordered to expunge from its files any reference to employees' loss of employment due to the unlawful plant closure and work transfer and to noti-

fy the affected employees in writing that this has been done and that the loss of employment will not be used against them in any way.

I further recommend that Respondent post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring,* 356 NLRB 11, 15–16 (2010). Also, in accordance with that decision, any question regarding the appropriateness of a particular type of electronic notice should be resolved at the compliance stage of this proceeding. 356 NLRB at 13.

The General Counsel has requested that the notice be read aloud by a responsible management official of Respondent or a Board agent in the presence of a responsible management official of Respondent. (GC Exh. 1(dd).) The Board requires this remedy when an employer's misconduct has been "sufficiently serious and widespread that reading if the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion." *Jason Lopez' Planet Earth Landscape, Inc.,* 358 NLRB 383, 383 (2012). The Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB 1350, 1355–1356 (2014); *Excel Case Ready,* 334 NLRB 4, 4–5, (2001). The Board has noted that "[t]he public reading of a notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *United States Service Industries*, 319 NLRB 231, 232 (1995), *enfd*. 107 F.3d 923 (D.C. Cir. 1997) (quoting in part *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969).). In light of the severity and pervasiveness of the violations detailed in this decision, I find that the General Counsel has established that this remedy is required to enable employees to exercise their Section 7 rights free from coercion. See *Casino San Pablo,* 361 NLRB 1350, 1355–1356 (2014); see also *Homer D. Bronson Co.,* 349 NLRB 512, 515 (2007), enfd. 273 Fed.Appx. 32 (2d Cir. 2008); *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 473 (1995).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

ORDER

The Respondent, Dura-Line Corporation, a subsidiary of Mexichem, Middlesboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure for grievance filing activity;

(b) Threatening employees that they would need body guards if they continued their grievance filing activity;

(c) Threatening employees by stating that their union activity had caused or would cause the plant to close;

(d) Threatening employees by stating that they could thank the local union president, the union, and the union's grievances for the closing of the plant;

(e) Threatening employees that they could not speak with other employees regarding their terms and conditions of employment or anything related to its Clinton, Tennessee facility;

(f) Threatening employees by stating that Respondent wanted to get rid of the Union because it wanted to do whatever it wanted to do;

(g) Threatening employees by stating that Respondent closed the Middlesboro facility because the Union had succeeded in getting two discharged employees reinstated;

(h) Threatening employees by stating that Respondent closed the Middlesboro facility because the Union had succeeded in getting two discharged employees reinstated;

(i) Requiring employees to sign a confidentiality agreement in order to discourage its employees from engaging in union or other protected, concerted activity;

(j) Closing and relocating work from its Middlesboro, Kentucky facility to its facilities in Tennessee, Georgia, and Ohio because employees engaged in union activities and to discourage employees from engaging in these activities;

(k) Destroying the personal property of employees;

(l) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees, with regard to the reduction of the amount of the 2015 Thanksgiving bonus, in the following appropriate unit:

> All production and maintenance employees employed by [Respondent] at its Middlesboro, Kentucky facility, including plant clerical employees and assistant shift leaders, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act..

(a) Restore the production work that was transferred from the Middlesboro, Kentucky facility to the facilities in Georgia, Ohio, and Tennessee in retaliation for employees' union activity at the Middlesboro facility.

(b) Upon request of the Union, rescind the unlawful change to its employees' 2015 Thanksgiving bonus amount that was made without first notifying the Union and giving it an opportunity to bargain. Respondent shall pay its employees listed in the attached Appendix B the difference between the amount of the 2015 Thanksgiving bonus and the amount paid in prior years, with interest as set forth in the remedy section of this decision, and minus any tax withholdings required by Federal and Commonwealth of Kentucky laws.

(c) Within 14 days of the date of this Order, offer the individuals listed in the attached Appendix B full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make the employees listed in the attached Appendix B whole for any loss of earnings and other benefits suffered as a result of the unlawful plant closure and transfer of work, less

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

any net interim earnings, plus interest.

(e) Compensate all affected employees for any adverse tax consequences of receiving a lump-sum backpay award.

(f) Reimburse the employees listed in the attached Appendix B as a result of the closure of and transfer of work from the Middlesboro facility for search-for-work and interim work-related expenses regardless of whether those expenses exceed interim earnings, plus interest.

(g) Within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, file a report allocating backpay with the Regional Director for Region 9. Respondent will be required to allocate backpay to the appropriate calendar years only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

(h) Within 14 days, remove from its files any reference to the unlawful layoffs of employees and, within 3 days thereafter, notify the laid-off employees in writing that this has been done and that the layoff with not be used against them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Middlesboro, Kentucky, copies of the attached notice marked "Appendix A" and the attached Appendix B.[38] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. As Respondent has closed the Middleboro, Kentucky, facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees employed at the Middlesboro facility by the Respondent at any time since June 26, 2015.

(k) Within 14 days after service by the Region, hold a meeting or meetings during working hours at the Middlesboro facility, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to employees by a responsible management official of Respondent, or, at Respondent's option, by a Board agent in the presence of a responsible management official of Respondent.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 20, 2017

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you by telling you that filing grievances will cause us to close the facility.

WE WILL NOT tell you that you will need bodyguards to get to and from the work if you file grievances.

WE WILL NOT tell you that the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC, Local 14300-12 (Union) caused us to close the Middlesboro facility or was the reason we closed the facility.

WE WILL NOT tell you that the union president, the Union, or the Union's filing of grievances caused us to shut down the Middlesboro facility.

WE WILL NOT tell you that we want to get rid of the Union so we can do whatever we want.

WE WILL NOT tell you that the Union's success in obtaining reinstatement for two discharged employees through a grievance caused us to close the Middlesboro facility.

WE WILL NOT throw away your personal belongings because you cooperated in a National Labor Relations Board investigation.

WE WILL NOT tell you that you cannot discuss your terms and conditions of employment or anything related to our Clinton, Tennessee facility with other employees.

WE WILL NOT require you to sign a confidentiality agreement/non-disclosure agreement as a condition of accepting positions at our new facility in Clinton, Tennessee, or any of our other facilities, in order to discourage you from assisting the Union or engaging in other concerted activities.

WE WILL NOT close our Middlesboro, Kentucky, facility and lay off bargaining unit employees because of their union activities and in order to discourage support for the Union.

WE WILL NOT refuse to bargain in good faith with the Union

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

as the exclusive collective-bargaining representative of our employees in the appropriate unit set forth below by reducing the amount of your Thanksgiving gift card benefit:

> All production and maintenance employees employed by [Respondent] at its Middlesboro, Kentucky facility, including plant clerical employees and assistant shift leaders, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT make changes to your terms and conditions of employment without first providing notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the production work that was transferred from the Middlesboro, Kentucky facility to our facilities in Georgia, Ohio, and Tennessee in retaliation for employees' union activity at the Middlesboro facility.

WE WILL, on request of the Union, rescind the change to your terms and conditions of employment, specifically the reduction of the amount of the 2015 Thanksgiving gift card benefit.

WE WILL, within 14 days and to the extent we have not already done so, offer the individuals listed in the attached Appendix B full reinstatement to their former jobs or, if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the employees listed in the attached Appendix B whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate the employees listed in the attached Appendix B for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL reimburse the employees unlawfully laid off as a result of the closure of and transfer of work from the Middlesboro facility for search-for-work and interim work-related expenses regardless of whether those expenses exceed interim earnings, plus interest.

WE WILL, within 14 days, remove from our files any reference to the unlawful layoffs, and WE WILL, within 3 days thereafter, notify the laid-off employees in writing that this has been done and that the layoff with not be used against them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

DURA-LINE CORPORATION, A SUBSIDIARY OF MIXICHEM

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-163289 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

EMPLOYEE NAMES (Last, First)

King, Donald	King, Douglas	Lane, Dennis
Ballew, David	Evans, Elmer	Green, Charles
Redmond, Carl	Dunn, Elzie	Maguire, Johnny
Rogers, Roy	Green, Paul	Newton, John
Kowalczyk, Jeffery	Wilder, Stevie	Miniard, George
Forester, Hurley	Johnson, Ronnie	Philpot, Bobby
Endicott, Dennis	Templeton, James	Smith, Phillip
Britton, Jerry	Brooks, Ricky	Partin, Michael
Ward, Gregory	Coffman, Richard	Crigger, James
Pratto, Alonzo	Poppe, Jerry	Brock, Sam
Boyles, David	Abbott, Donald	Hatfield, Robert
Lee, Jonathan	Hatfield, Mark	Hoskins, Curtis
Aker, Michael	Brock, Derek	Heck, Silas
Collett, Donald	Hatfield, Benjamin	Panther, Richard
Brock, Brian	Straiger, Jason	Hobbs, Michael
Wilder, Jacob	Eads, Tony	Fodor, Todd
Hill, John	Kowalczyk, Curtis	Craig, Matthew
Chumley, Freddie	Kyle, Christian	Rains, Carl
Mullins, Jack	Bingman, Derek	Rains, Donavon
Warwick, David	Daniels, David	Hunley, Brian
Holt, Chad	Maguire, Joe	Witt, David
Scott, James	Ciferri, Travis	Wilder, Winston
Belcher, Jesse	Dixon, Dustin	Clark, Jason
Miracle, Lonnie	Baker, Ernest	Shackelford, Christopher
Brock, Allen	Jones, Clifford	Smith, Bryan
Wilder, Dustin	Smallwood, Winston	Webb, Jonathan
Maiden, Hillary	Forester, Cody	Hammontree, Randy
Gardner, Samuel	Howard, Shawn	Hurst, Joshua
Widner, Kenneth	Cox, Jeffrey	Lambdin, Jeffrey
Leach, Casey	Scott, Shawn	